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IN THE

Supreme Court of the United States

OCTOBER TERM 1926
No. 358.

ALBERT OTTINGER, as Attorney General of the State of New York,
Appellant,

vs.

THE BROOKLYN UNION GAS COMPANY

BRIEF OF APPELLEE THE BROOKLYN UNION GAS COMPANY.

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Judgment to be Reviewed:
Dated: August 3, 1925 (R. 225)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926. No. 358.

ALBERT OTTINGER, *as* Attorney General of the State of New York,
Defendant-Appellant,

vs.

THE BROOKLYN UNION GAS COMPANY,
Plaintiff-Appellee.

Brief for Appellee.

STATEMENT OF CASE.

Suit in equity against the Attorney General and Public Service Commission of New York to restrain the enforcement of L. 1923, Ch. 899 of the state as confiscatory and therefor in violation of Section One of the Fourteenth Article in addition to and amendment of the Constitution of the United States. Chapter 899 of the laws of 1923, which became effective June 2, 1923, follows:

"AN ACT to amend the public service commission law, in relation to the charge for illuminating gas in cities containing a population of one million or over.

Accepted by the City.

Became a law June 2, 1923, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter four hundred and eighty of the laws of nineteen hundred and ten, entitled 'An act in relation to the public service commission and the transit commission constituting chapter forty-eight of the consolidated laws,' is hereby

amended by inserting therein a new section, sixty-seven, to be section sixty-seven a, to read as follows:

§67a. Charge for gas in cities of one million or more. A gas corporation engaged in the business of manufacturing, furnishing, or selling illuminating gas in a city containing a population of one million or over shall not charge or receive for gas furnished or sold in such city a sum per one thousand cubic feet in excess of one dollar, nor furnish in such city gas of a standard less than six hundred and fifty British thermal units per cubic foot, measured under normal conditions of temperature and atmospheric pressure. The public service commission, notwithstanding any provision of this chapter, shall not allow a rate or charge in the case of such cities in excess of such sum.

§2. This act shall take effect immediately."

This suit was commenced June 4, 1923.

A rule to show cause with a temporary restraining order was granted June 27, 1923 by the District Court for the Eastern District of New York. Thereafter a court constituted according to the Judicial Code granted an interlocutory injunction. Almet Reed Latson was appointed Special Master by order dated October 11, 1923 (R. 20) and thereafter held hearings beginning December 5, 1923 and concluding July 20, 1924 (R. 23). The Special Master made a tentative report December 29, 1925 (R. 24) after which objections thereto by counsel were heard and the final report and opinion filed March 21, 1925 (R. 155). Thereafter on motion of appellant the report and opinion were modified and as modified confirmed by a decree of the District Court entered August 3, 1925 (R. 225).

The Public Service Commission not having appealed an order of severance was entered September 22, 1925 (R. 230) and leave given the Attorney General to appeal, no bond for costs being required by the District Court.

Argument.

Chapter 899 of the Laws of 1923 of the State of New York reduced the price for gas from $1.15 per thousand cubic feet to $1.00 and increased the thermal content from 537 British thermal units to 650 per cubic foot. The increase in thermal units would increase the cost of manufacture 6.71 cents (Fdg. 191, R. 153), and so decrease the net to appellee 21.71 cents per thousand cubic feet. The price and standard had been fixed by the Public Service Commission effective October 1, 1922 for one year and thereafter until changed by the Commission (Answer P. S. C., R. 17).

The defendants were the Public Service Commission and the Attorney General. Each took an active part in the trial. The decree held the law confiscatory and unconstitutional and left the future to the Public Service Commission R. 225).

> *Bklyn. U. Gas Co.* v. *Prendergast,* 7 Fed. (2d Series), 628.

The decree modifies the finding of the Special Master by increasing a deduction in the finding of reproduction cost to restore portions of appellee's property to a condition equal to new, sustains appellee's exception to receipt of assessment rolls in evidence and otherwise affirms the report and findings of the Master. It adjudges Chapter 899 of the Laws of 1923 to be confiscatory and therefore unconstitutional and void (R. 225). It provides:

> "V. A maximum rate of $1.00 per thousand cubic feet of gas sold by the plaintiff, in conjunction with or apart from the standard of 650 minimum British thermal units per cubic foot, is illegal and void, because in contravention of Section 1 of Article 14 of the Articles in addition to and amendment of the Constitution of the United States of America; and the provisions of Chapter

> 480 of the Laws of 1910 of the State of New York, known as the Public Service Commission Law, as amended and supplemented, and of Chapter 899 of the Laws of 1923, in so far as they prohibit the plaintiff from charging or receiving for gas manufactured and sold in the City of New York, a sum, per one thousand cubic feet, in excess of the rate of one dollar per thousand cubic feet, in conjunction with or apart from the said standard, are each likewise illegal and void.

The decree enjoins the Public Service Commission and the Attorney General from taking any action or proceeding to enforce the provisions of the law (R. 227).

It further provides (R. 230):

> "XVII. Nothing contained herein shall be construed to limit, prejudice or restrict the exercise of the jurisdiction and power of the Public Service Commission of the State of New York under Chapter 480 of the Laws of 1910 as amended and supplemented, known as the Public Service Commission Law, or any other provisions of law, not in conflict with the provisions of this decree."

The New York Court of Appeals has held in such a case that the Public Service Commission may at any time fix a new rate and a new standard.

> *Morrell* v. *Brooklyn Borough Gas Co.*, 231 N. Y. 405.

Rejecting the evidence and contention of appellee nothing was allowed in the rate base for going concern value (R. 215); nor anything for special franchises (R. 206) although held by the Court of Appeals to vest in a Company a perpetual indefeasible estate in the lands in the streets of Brooklyn.

> *People* v. *O'Brien*, 111 N. Y. 1.

Likewise the order of the Public Service Commission fixing the rate in effect June 1, 1923, the acceptance of

it by the appellee and the expenditure of $108,000. was held not to constitute a contract (R. 199). Going concern value was allowed as part of the rate base in the cases of the Consolidated and Kings County Companies.

History of Appellee.

The Master found (Findings 1, 2, 3, 22, 24, 30, and 34, R. 88, 91, 96) and these are undisputed:

> "1. Plaintiff, The Brooklyn Union Gas Company, was incorporated on or about September 9, 1895, under and pursuant to the provisions of the Transportation Corporations Law of the State of New York for the purpose of manufacturing and supplying gas for lighting the streets and public and private buildings in the former City of Brooklyn, now the Borough of Brooklyn, City of New York."
>
> "2. In October and November, 1895, plaintiff, pursuant to the Stock Corporation Law, Chapter 564 of the Laws of 1890 of the State of New York, as amended, purchased the property, rights, privileges and franchises of The Nassau Gas Light Company, The Peoples Gas Light Company, Metropolitan Gas Light Company, The Williamsburgh Gas Light Company, The Brooklyn Gas Light Company, The Fulton Municipal Gas Company and The Citizens Gas Company.
>
> "3. Prior to November 4, 1895, plaintiff had no gas manufacturing plant, street mains, services or meters but became possessed of such properties through the purchase from the above vendor companies."
>
> "22. Each of the corporations hereinbefore named and their predecessors had, prior to the purchase above described, obtained the consent of the municipal authorities to lay conductors for conducting gas through the streets, lanes, alleys and squares in the former City of Brooklyn, now the Borough of Brooklyn, City of New York, and each at the same time of such purchase had constructed and owned manufacturing plants and stations and mains and services and was engaged in

the distribution and sale of gas. Each of such companies had, prior to November 4, 1895, secured consumers sufficient in number and in quantity of gas consumed to constitute an established and remunerative business.

"24. 1,017 miles of mains now exist in 905 miles of streets. The greater portion of this excess is due to the fact that prior to November 4th, 1895, more than one vendor corporation had laid mains in the same street. Since that time, plaintiff itself has installed certain second mains in the same street where an increase in demand or subsurface conditions rendered this desirable in its opinion. Transmission mains necessarily lie in the same street as distribution mains.

"30. In 1896 plaintiff purchased all the bonds and capital stock of Equity Gas Company and paid therefor its First Mortgage Bonds of the face value of $500,000. At the time of such purchase Equity Gas Company owned a manufacturing plant which has since been in possession of and operation by plaintiff for the manufacture of gas distributed and sold through plaintiff's mains and services to the inhabitants of certain wards of the City and Borough of Brooklyn.

"34. Plaintiff has, since the date of its organization, owned, possessed, used and enjoyed all the property, rights, privileges and franchises hereinbefore described and has maintained and still maintains mains and services acquired from the companies described in Finding 2 and additional mains and services laid by plaintiff throughout Wards 1 to 28, inclusive, and Ward 32 and parts of Ward 29 of the former City, now the Borough of Brooklyn, and has manufactured, distributed and sold, and still manufactures, distributes and sells gas to the inhabitants of said wards."

No evidence was offered by defendants on these subjects.

The Stock Corporation Law was amended in 1893 and the amendment was in force in 1895 when the plaintiff

appellee purchased the properties and franchises of the Companies above-named. The law provided:

> "Section 33. Sale of franchise and property. A stock corporation, except a railroad corporation and except as otherwise provided by law, with the consent of two-thirds of its stock, may sell and convey its property, rights, privileges and franchises, or any interest therein or any part thereof to a domestic corporation, engaged in a business of the same general character, or which might be included in the certificate of incorporation of a corporation organizing under any general law of this state for a business of the same general character; and such sale and conveyance shall vest the rights, property and franchises thereby transferred in the corporation to which they are conveyed for the term of its corporate existence, subject to the provisions and restrictions applicable to the corporation conveying them." (L. 1893, ch. 638).

The Stock Corporation Law of New York (Section 55) authorized the issue of stock or bonds "for money, labor done or property actually received for the use and lawful purposes of such corporation."

The Master found (Fdg. 35, R. 100).

> "35. Plaintiff issued, delivered and paid to the corporations described in Finding 2, in consideration of the sale to plaintiff of the property, rights, privileges and franchises therein described, shares of the capital stock of plaintiff of the par value of $15,000,000 and bonds of plaintiff, secured by a mortgage of its properties and franchises, of the face value of $10,600,000, which stock and bonds were forthwith distributed by the officers of the said corporations to the stockholders of said corporations. The authorized issue of such bonds amounted to the face value of $15,000,000 of which bonds of the face value of $10,600,000 were issued, bonds of the face value of $3,900,000 being reserved for the retirement when due of bonds of equal face value of the corporations named in Finding

> 2, of which said bonds so reserved there now remain in the possession of plaintiff, for the purpose of such retirement, bonds of the face value of $264,000."

and again (Fdg. 40, R. 103):

> "The capital stock, mortgages and debenture bonds of plaintiff were in each instance issued in consideration of money, satisfaction of antecedent indebtedness and property in amount and value apparently equal to the par value of said stock and the face value of said bonds. That such was the opinion of the board of directors of the plaintiff at the time of the transaction is indicated by the minutes of the meetings of the several boards of directors and the reports of committees conducting these negotiations."

Gas Sold by Appellee.

The appellee makes and sells carburetted water gas. The process of manufacture is described by its witness Atwood (R. 356). Prior to October 1, 1922 the standard was twenty-two candle power and the price $1.25 per M. cu. ft. By order of the Public Service Commission, effective on that day the standard was changed so that each cubic foot of gas should contain not less that an average of 537 British thermal units and the price was fixed at $1.15 per M. cu. ft. (Ex. 68, R. 1522; Ex. 80, R. 1535). During the year 1923 the appellee furnished 587 B. t. u. gas (R. 1952, Ex. 264). Using for this purpose 3.52 gallons of oil per M. cu. ft. To make 650 B. t. u. gas it would be necessary to use 4.5 gallons of oil.

Appellant (Brief, p. 11) states that the gas manufactured by appellee is water gas made by gasifying steam passed through a very hot fire and resulting at the first stage of manufacture in blue gas with no lighting power. To this gas oil is added resulting in both heating and lighting value known respectively as thermal units and candle power. This is correct but the following state-

ments concerning testimony by appellee's engineer Atwood are inaccurate. Throughout his direct and cross examination the witness consistently maintained that there is no connection between candle power and thermal units making it possible to state that gas of any particular candle power contains a definite number of thermal units or *vice versa*. The appellant states:

> "Appellee's engineer testified that three gallons of gas oil per M. would produce gas of 16.5—18.5 candle power and containing 540 British thermal units per foot (Brief, p. 11)."

On the contrary, referring the Court to but one instance where Mr. Atwood disclaimed any such relation, he testified (R. 396):

> "I cannot tell you how many b. t. u.'s there are in 20 candle power or 10 candle power any more than I can in regard to 22 candle power".

Appellant further states Mr. Atwood testified that the use of four gallons per M. would give a gas of 22 to 25 candle power and containing 625 British Thermal Units per foot and refers to testimony (R. 397).

This witness testified at length on direct upon the manufacture of carburetted water gas (R. 356 *et seq.*). Having described the process he then took up the absence of relation between candle power and thermal units (R. 363), and, in describing the adjustments necessitated by a change from the candle power standard to a heating standard in accordanec with the Public Service Commission's order of August, 1922, testified, as follows:

> "I have not stated the heating value of 22 candle power gas. That is a very difficult thing to state. It varies greatly. I felt that there was a certain heating value which could be burned in the burners as adjusted for 22 candle power gas." (R. 363).

He then explained the nature of the adjustments required by the change of standard and the necessity for them

(R. 363-369) and took up the effect of adding oil to blue gas, testifying that in order to furnish gas of a standard not less than 650 British thermal units per cubic foot measured under conditions of 60 degrees Fahrenheit and 30 inches of atmospheric pressure would require not less than 4.5 gallons of oil and 32.5 pounds of generator fuel per thousand cubic feet of gas made (R. 369) and that it was impossible, in the absence of some established rule for the conditions of temperature and atmospheric pressure under which the thermal content of the gas is to be measured, to determine what quantity of oil must be added to produce 650 British thermal units per thousand cubic feet and that the place of measurement must also be determined, there being a loss of thermal content between the works and any point on the line of delivery (R. 370).

Immediately, on cross-examination, counsel for the Attorney General attempted by this witness to establish a definite relationship between candle power and British thermal units (R. 388 *et seq.*) without success and the witness will be found throughout his cross-examination denying any such relationship and stating:

> "I do not know what the heating value would be of the 22 candle power gas. We might be producing 650 B. t. u. with 22 candle power. It is the same process exactly. But we might not. (R. 393)
> "The heating power may be the same or it may be different. The heating power of 22 candle power gas ranges from 600 to 660 or 670. I have seen 22 candle power gas average for a few days 650 and for a few days more 610. You can always strike an average if you cover a long enough period." (R. 393)
> "I would not agree with the statement that 650 B. t. u. gas is 22 candle power gas under another name." (R. 394)
> "I have not stated that I do not know the average of 22 candle power gas. I have stated that by av-

eraging a few days you will get one value and by averaging some other period you will get another value. Averaged over a year I think you would get around probably 630 or 640. I guess 630 is probably nearer to it than 640. I am talking now about the gas made at the works. I think 22 candle power gas over a period of a year would average about 630 B. t. u. content; next year it might be something different, perhaps." (R. 395)

Properties Purchased in 1895.

The appellee bought all the properties of seven vendors for $29,500,000. (Fdg. 35, R. 100.)

The vendors' books in evidence show ledger balances as of the day of the sale $16,524,095.35. From this the Attorney General argues that there was an inflation of values and a write-up overnight. The Special Master wrote (R.):

> "Many ancient records and books of account of the vendor corporations were found, such as minute books, ledgers, journals, etc., but no complete record, however, as to any one of the vendor companies. One of the plaintiff's witnesses, a certified public accountant, testified that he had carefully examined all of these books and found the record so incomplete that it was impossible to ascertain the amount which the vendors had paid for the properties apparently owned by them and presumably turned over to the plaintiff in November, 1895 (pp. 6760, 7276, *et seq.*) These books were made available to the defendants who, in turn, caused the same to be examined by certified public accountants of their own choosing. The result was substantially the same, although additional information concerning the cost of certain specific items was thereby developed (p. 7832, *et seq.* and p. 7955, *et seq.*) No attempt was made, however, by either side to fabricate from these incomplete records the cost to the vendors of the

properties which it is assumed were acquired by the plaintiff."

And, again:

> "Taking the evidence on this subject as a whole, and without stopping to make an extended analysis, I deem it sufficient to say that an industrious effort was made by plaintiff to establish the original cost of the vendors, which proved unsuccessful, and the defendants supplemented this effort with no greater success. I therefore conclude that it is incapable of proof" (R. 43).

(The references by the Master were to the printed minutes of the trial.)

There was no write-up overnight. A Vice-President of appellee who had been President of the Metropolitan Gas Light Company and was familiar with all the negotiations for the sales to appellee and an engineer and accountant spent eleven months in appraising the properties and opening the books of appellee (R. 786).

The appellee's opening balances aggregate	$28,799,731.92
of which franchises and rights were entered at	3,050,000.00
leaving for the other items	$25,749.731.00
The vendors' manufacturing plants and distribution system cost on the historical basis (R. 1237)	$23,976,000.00
Vendors' land, at cost to vendors	2,619,226.00
Vendors' working capital	1,254,665.00
	$28,849,891.00

VENDOR COMPANIES

WORKING CAPITAL ON HAND—NOVEMBER 4, 1895

TAKEN FROM THEIR BOOKS IN EVIDENCE APPELLANT'S EX. 1 (R. 2092)

	Brooklyn Gas Light Company	*Citizens Gas Company*	*Fulton Municipal Gas Co.*	*Metropolitan Gas Light Company*	*Nassau Gas Lt. Company*	*Peoples Gas Lt. Company*	*Wmsburgh. Gas. Light Company*	*Total*
Cash	$121,861.33	$ 69,482.42	$ 4,461.84	$178,416.32	$ 59,750.00	$10,160.81	$152,268.58	$ 596,401.30
Accounts Receivable	43,719.26	42,614.52	74,328.29	45,026.06	57,319.71	41,005.82	32,783.34	336,797.00
Manufacturing Materials	18,171.23	10,491.53	24,253.12	10,157.94	28,059.41	59.10	14,054.97	105,247.30
Distribution Materials	2,527.51	2,495.75	6,002.99	3,152.63	1,883.78	1,275.00	5,525.19	22,862.85
Sundry Supplies	75.85	49.13	54.77	75.90	91.33	13.30	54.47	414.75
Gas Stoves	326.05	113.22	1,190.96		325.40	1,198.85	.,517.44	4,671.92
Special Deposits	158.00	145.00	1,371.00	25.00	80.00	112.00	750.00	2,641.00
Gas on Hand	29,147.89	11,844.11	28,412.07	14,546.15	28,649.45	9,900.60	63,129.46	185,629.73
	$215,987.12	$137,235.68	$140,075.04	$251,400.00	$176,159.08	$63,725.48	$270,083.45	$1,254,665.85

Concerning the cost on the historical basis of the manufacturing plant and distribution system purchased by the appellee in November, 1895, Mr. Miller testified (R., 1136):

> "I have made a study of the cost of material and labor entering into construction of plants and general structures for the manufacture and systems for the (fol. 1753) distribution of illuminating gas in what is now the City of New York prevailing during the period since 1850. In connection with this study, I obtained index numbers of wholesale prices from 1840 to 1923 published by the United States Department of Labor.
>
> These index numbers in my opinion indicate the trend of prices of general commodities during the period from 1850 to 1895. Assuming that on January 1, 1896, the plaintiff owned plants and general structures for the manufacture, distribution and sale of illuminating gas, having a daily manufacturing capacity of 26,800,000 cubic feet; holders, having a capacity of 13,534,000 cubic feet; mains as follows:

One and one-half inch	3,867 feet
Two inch	8,456 feet
Three inch	383,039 feet
(fol. 1754) Four inch	632,391 feet
Six inch	992,593 feet
Eight inch	308,608 feet
Ten inch	126,341 feet
Twelve inch	274,515 feet
Sixteen inch	75,355 feet
Twenty inch	93,683 feet
Twenty-four inch	4,928 feet
Thirty inch	474 feet

88,024 services; 113,723 meters which have been acquired in the preceding November from the following companies:

> "The Citizens Gas Company which has been formed pursuant to an agreement dated August 27, 1891, consolidating two existing corporations;

The Citizens Gas Light Company, incorporated in 1858, and which commenced the construction of its manufacturing plant and the installation of its distribution system in the year 1860;

The Union Gas Light Company, incorporated in 1861; the Fulton Municipal Gas Company, which commenced the construction of its manufacturing plant and the installation of its distribution system in the year 1879; the Peoples Gas Light Company, which commenced the construction of its manufacturing plant and the installation of its distribution system in the year 1869; the Nassau Gas Light Company; which commenced the construction of its manufacturing plant and the installation of its distribution system in the year 1870; the Williamsburg Gas Light Company which commenced the construction of its manufacturing plant and the installation of its distribution system in the year 1850; (fol. 1755) the Metropolitan Gas Light Company, which commenced the construction of its manufacturing plant and the installation of its distribution in the year 1871,

And the Brooklyn Gas Light Company, which commenced the construction of its manufacturing plant and the installation of its distribution system in the year 1849; all of which manufacturing plants and distribution systems continued to be extended up to the time of the sale to the plaintiff. I will state that in my opinion the properties of these companies so acquired ought to have cost on the basis of the prices prevailing during the period when the various units were constructed, $24,438,680.

Mr. Cummings: My objection, is, first, that it is incompetent, irrelevant and immaterial; second; it is not the best evidence; the books would be the best evidence. Third, it is an assumption of facts which have not been proven. Now, if you want to overrule that objection upon Mr. Dykman's promise that he will connect it up, that possibly might rest within your discretion, so that you could overrule that part of the objection that the books are the best evidence unless it is shown here conclu-

sively that they do not contain this information. He has got to prove it first, it seems so to me, that either the books are not available, or, if they are available, that they do not contain this data. He is resorting to secondary evidence without establishing the fact that primary evidence is not available.

(fol. 1756) The Witness: That figure, $24,438,680, does not include anything for land, nor for franchises, nor for working capital, nor did I in arriving at this opinion use the books of any of the so-called vendor companies.

I used the opening entry of the Brooklyn Union Gas Company for the furniture and fixtures and tools and implements, and that is all. I used the Senate Report, Second Sessions, 52nd Congress, 1892-1893, Wholesale Prices, Wages & Transportation, generally known as the Aldrich Committee Report and I also used what is known as Bulletin 284 of the Department of Labor, entitled Index Numbers of Wholesale Prices in the United States and Foreign Countries, dated October, 1921.

I used the weighted figures out of the Aldrich Report, I also used Bulletin 1626 of the Bureau of Labor Statistics, entitled Index Numbers of Wholesale prices, 1840 to 1923.

In arriving at my estimate of $24,000,000, I estimated the value of the property specified in 1895 at 1895 figures. I assumed that they had the property specified in the question. The value in 1895 was $17,996,212. That was my estimate of the reproduction cost of that property at that time.

Now, the index number in 1895 based on the fully weighted Bureau of Labor report as shown by the Aldrich Committee Report based on standards of 1860 was 112.17. That is the average from 1849 to 1895. Now in bringing in the figures from 1892 to 1895 I had to take the 1913 base, because the Aldrich Committee Report stopped in 1891 and the 1913 base of the Bureau of Labor was carried back to the 1860 base by the figures of 1890 which appeared in both tables.

(fol. 1757) To convert one price level to the other I used 1.18. The average index number was 112.17, and the index number for 1895 was 82.6, so I multiplied the value in 1895 of the portions of the plant specified by 112.17 and divided by 82.6. I did not convert 1913 to the 1860 basis.

Then having found that the index number for 1895 was 82.6 and having determined that the average index number over the period from 1849 to 1896 was 112.17 I multiplied $17,996,212 by 112.17 and divided by 82.6 and that got me this $24,000,000. $24,438,680 that is the complete figure[1]. That assumes that in each year from 1849 down to 1895 the same relative amount of additions were made to the plants, and also that the prices of cast iron, steel and so forth vary with the index price. In 1849 one plant was started, the Brooklyn Gas Light Company. I don't know that that plant was constructed entirely during that year and I do not know what portion of it was constructed during the years 1849 down to 1860. I don't know how much of it was in existence at that time, from 1849 down to 1860. I don't know what was the next plant that was started. I don't know and could not tell you the relative dates here. I have seen them all, but I do not remember them. I have already told you that the computation assumes practically uniform construction. It does not make any difference which date or which was constructed at which time as long as the construction is substantially uniform; it does not make any difference which is first or last, the answer will be the same.

In general they were being constructed at more or less regular periods down the years.

(fol. 1758) I took it as helping my assumption that the construction was reasonably uniform."

Colonel Miller checked his estimate of historical costs by the books of the vendor companies (R., 1238):

[1]This figure was subsequently corrected to $23,976,790. (R. 1237).

"I have observed by way of comparison how this cost data, such as it is, in these books, compares with the index numbers that I have adopted in arriving (fol. 1904) at my opinion as to what this ought to have cost. In the case of cast iron pipe there are quite a few points by which I can test my cast iron pipe table, and I find that the index number of the cast iron pipe in 1895 as compared to the average index number is very much lower than the index number of average commodities in 1895 as compared to the index numbers of the average commodities during the period, the figure which I used. In other words, the cast iron pipe prices would indicate that I was over conservative.

Coming to gas meters, the tendency in some years would indicate that I had been overly conservative. In other words it would fall above the index number, and in other years it would fall below the index number, but there are so few prices of gas meters in the first twenty-five years of the companies when the prices were high, that it is not possible to make a complete check of the index number. Most of the prices of gas meters, almost all of them, are since 1875. There are only two prices of gas meters previous to 1873 that I was able to find, with the single exception perhaps of an inventory which does not indicate whether that was a real price or an inventory price. I mean it does not indicate whether the company paid these prices for the meters. There is an inventory price in the late 50's and early 60's, but the actual purchase prices in the early years (fol. 1905) indicate that in using commodity index numbers I was too low. The twenty years from 1875 to 1895 indicate in some years that I am too low and in some years the commodity prices are high. I refer to meters just now. On pipe I am very low. In this last statement in reference to the twenty years from 1875 to 1895 I am talking about meters, I find a single building, that being the Williamsburgh Office Building which cost, after making due adjustment on the index number

> basis under my average index number, that building was $52,000. That building actually cost $83,000. In 1895 I got that building in at $39,000. There is very little else. There are quite a few gas holders. There is the record of the construction of quite a few gas holders which, from the information available to me, does not indicate that the record shows the complete cost of any of those holders. Taking what records of cost can be found, in some cases it indicates that the index number would give a lower figure than the holder actually costs and in other cases that the general commodity index number worked back would give a higher figure than the holder actually cost, but the records do not seem to indicate whether all other charges are against those holders or not."

Appellant states (Brief, p. 27) that an examination of the books of the vendor companies discloses that it was not their practice to credit capital accounts for withdrawals so that at the time of the "consolidation" they were carrying in their capital accounts all additions to their propriety with few, if any, credits for withdrawals and for this assertion cites the Court to his witness Mr. Saffer (R., 1320-1327).

The Attorney General called two accountants, Messrs. Saffer and Welsh. Mr. Saffer examined one account entitled "Construction" in the books of the Williamsburgh Company for the last ten years of its existence, 1885 to 1895 (R., 1320), and found the balances of this account annually charged off to profit and loss (R., 1321), finally testifying on cross-examination (R., 1326):

> "As an accountant, I am not prepared to swear that in my opinion the Construction Account shows the full cost even of the items of property mentioned in it."

Mr. Welsh (R., 1343 *et seq.*) stated on his direct that he had made an analysis of the Construction Account of

the Nassau Gas Light Company (R., 1344) and was able to tie in specific accounts reported in the minute books of that Company for contracts for certain items of construction found in the Construction Account. On cross examination he was unable to tell from the information at his disposal "what the law expenses were" or "what the lawyers did" or "where the watchman was employed" or "where the boilers were installed" or "what the size of the boiler was" or "whence the night soil was removed" or "for what purpose" or "where the piles were driven" or "how many piles there were" or "who drove them" or "what sort of lumber was embraced in an item" or "to what use it was put, whether it was a temporary scaffolding or a permanent building" or "what Mr. Seymour L. Husted got paid for" or "who he was" or "what certain laborers worked at who might have been putting up a retort, digging a hole or doing anything" (R., 1370-1375).

The testimony of these witnesses fully sustains the finding of the Master that nothing can be gathered from the books of the vendor companies other than specific items such as Mr. Miller used for checking his estimates (supra, pp. 11, 17).

Under the same heading (Brief, p. 30) appellant asserts that a stipulation between counsel (R., 1007) is "another supporting indication of original inflation in the vendor companies' books". The final statement of the stipulation (R., 1009) shows that it relates entirely to the period subsequent to 1895 and has no relation whatever to any practice of the vendor companies prior to that time. Counsel for appellee there stipulates that:

> "The account Plant and Patents was opened in 1895 at approximately $10,000,000. If 40 per cent., or approximately $4,000,000 is withdrawn, there will remain $6,000,000 representing holders, buildings and gas making apparatus acquired in 1895 and still in use, the $4,000,000, in other words,

> representing buildings and gas making apparatus withdrawn from service prior to 1909, it appearing in the record that the one holder which has been withdrawn has been actually credited in the account,"

and the statement of Mr. Deegan, counsel for the commission, immediately following shows it was thoroughly understood that the stipulation related to withdrawals, in his own language, "between the years 1895 and 1909". This disposes of the charge of inflation and "a write-up overnight". Appellee purchased also the franchises and going concern value of the seven vendors and the franchises and rights were valued by Messrs. Stoddard, Vice-President and Young, and entered on the books of the Company, at $3,050,000 (Plff's. Ex. 297, R. 2066). The real estate, the original cost of which running through the years 1849 to 1895 was $2,619,226. was estimated and entered upon the appellee's books at $5,349,500. There is no evidence except the entry of the value of the land purchased by the appellee.

For these properties, costing $28,849,891 and for the vendors' franchises and going value the appellee paid $29,500,000. in its bonds and stock. In 1896 it bought the Equity Company for $500,000 in its bonds (R. 310, Plff's. Ex. 62, R. 1499; Fdg. 30, R. 97).

Appellee shortly after 1895 purchased the capital stocks of so-called subsidiaries for cash out of earnings. The purchase price $624,530.50 is shown in the table quoted by the Attorney General (Brief p. 32).

Concerning these subsidiaries the Master found (Fdgs. 118, 119, 120, R. 124):

> "118. Plaintiff owns all the stock of five so-called subsidiary companies, each of which distributes and sells gas to its consumers, to wit, The Newtown Gas Company, the territory of which is the 2d ward of the Borough of Queens; The

Jamaica Gas Light Company, the territory of which is part of the 4th ward of the Borough of Queens; The Woodhaven Gas Light Company, the territory of which is part of the 4th ward of the Borough of Queens; Richmond Hill and Queens County Gas Light Company, the territory of which is part of the 4th ward of the Borough of Queens and The Flatbush Gas Company, the territory of which is the 29th ward of the Borough of Brooklyn, which companies together with plaintiff constitute what is generally known as 'The Brooklyn Union System'."

"119. Each of the so-called subsidiary companies purchases from plaintiff all gas distributed by it. The transmission and distribution mains and holder stations of The Brooklyn Union System are interconnected. The Newtown Gas Company and The Flatbush Gas Company each own and operate holders and holder station facilities which plaintiff rents and the cost of which plaintiff apportions to the remaining subsidiary companies participating in the use thereof. Local commercial organizations separate and apart from that of plaintiff are maintained by the so-called subsidiary companies, the general administrative organization for the system being maintained by plaintiff. Plaintiff pays all expenses of such general administrative organization and apportions the cost to each of the so-called subsidiary companies according to the ratio of the volume of sales of gas of each so-called subsidiary to the total volume of sales of The Brooklyn Union System."

"120. Plaintiff charges the so-called subsidiary companies the cost to manufacture the gas purchased by each plus an amount designed to reimburse plaintiff for general administrative services and a return on and the carrying cost of the property of plaintiff devoted to the use of each so-called subsidiary company. Plaintiff charges the Newtown Gas Company and The Flatbush Gas Company 21 cents per thousand cubic feet of gas purchased by each such company, and Richmond Hill and Queens County Gas Light Company, The Jam-

aica Gas Light Company and The Woodhaven Gas Light Company, 26 cents per thousand cubic feet of gas so purchased. The differential represents payment for the use of holder and station facilities. The quantity of gas purchased by each so-called subsidiary company is determined by adding to the quantity of gas sold, as measured by the meters of the consumers of each such so-called subsidiary, and the gas used by each such so-called subsidiary, also measured by meters, a quantity representing so-called unaccounted for gas. The above described arrangement results in a fair, reasonable and equitable apportionment of the cost of general administrative organization expenses and the use and operation of jointly used facilities."

In 1922 the funded debts of the subsidiary Companies amounted to $5,222,000 (R. 1513).

The bonds of the subsidiaries securing the debt the plaintiff-appellee purchased in 1922 for cash (R. 1513).

Property of the Appellee.

On December 31, 1923, appellee owned or had in service six manufacturing plants with a daily capacity 124,400,000 cubic feet; twenty-seven commercial holders with a capacity of 35,957,000 cubic feet; office buildings, warehouses, shops and garages; 1,027.29 miles of mains; 150,750 service pipes, and over 500,000 meters (Findings 45, 46, 47, R. 104, 106).

The original cost of appellees property devoted to the public use in Brooklyn was found to be:

Plant, June 1, 1923	$39,000,000.
Added, June 1, 1923, to Dec. 31, 1923..	3,092,000.
Working Capital	5,000,000.
	$47,092,000.

The Master found (Finding 109, R. 118) the fair value of all appellee's property on December 31, 1923, to be $58,000,000. The excess of the return over cost, at the statutory rate $1. for 650 British thermal unit gas, was found to be $0.085 per thousand cubic feet or $1,300,-531.71 per annum (Finding 191, R. 153).

The Master added Miscellaneous Revenue from the sales of appliances, residuals and other sources 2.06 cents per M. Cu. Ft. to the $1. price fixed by the statute. The Attorney General on the contrary subtracts it from distribution cost. The result is the same under both methods. The income is 2.24% upon the present value and less than 2.8% upon the original cost.

History of Rates.

The Transportation Corporations Law (L. 1890, Ch. 566, Sec. 70), under which the appellee was organized, limited the price of gas to $1.25 per thousand cubic feet for gas of a standard of 20 candle power. Eighteen months later the appellee contracted with the City of Brooklyn to reduce the price five cents a year until 1901 when the price reached $1. per thousand cubic feet (Fdg. 32, R. 99). The Master closes his finding with these words:

> "At all times since its organization and commencement of business the maximum rate to be charged by plaintiff has been regulated by law."

This dollar rate for twenty candle power gas continued until 1906.

By Chapter 125 of the Laws of 1906 the maximum charge for gas was fixed at eighty cents per thousand cubic feet and the standard was increased to twenty-two candle power. This law was held confiscatory and unconstitutional in an action by appellee against the At-

torney General and the Public Service Commission in the District Court for the Southern District of New York and the decree was affirmed in this Court. (*Newton, Atty. Gen.* v. *Bklyn. U. &c. Co.*, 258 U. S. 604.) Thereupon the appellee filed its rate schedule with the Public Service Commission fixing a rate of $1.50 per M. cu. ft. On August 1st, 1921, appellee filed another rate schedule reducing the price to $1.25 per M. cu. ft. and this rate was in effect when the Public Service Commission made its order to which reference is about to be made.

In 1922 the cost of making 22 candle power gas, the then standard, was 95.26 cents per M. cu. ft. Added to the price $1.25 was miscellaneous revenue of 1.7 cents making a total revenue of $1.267 or a difference between cost and income of 31.5 cents. The decree in the present case gives appellee eight per cent on $55,000,000 as of June 1st, 1923 which, spread over sales of 15,000,000 cubic feet, gives 28.76 cents. June 1st is taken rather than December 31st because it represents the average of properties in service during that year.

The Public Service Commission Law of New York, Chapter 480 of the Laws of 1910, authorized the Commission to fix from time to time rates and standards for gas (Secs. 66 and 72).

The Commission in May, 1921, began an investigation into rates and standards.

Its orders were made August 30, 1922, effective October 1, fixing a price of $1.15 per thousand cubic feet and a standard of 537 thermal units per cubic foot (Plff's. Exs. 68-80, R. 1522, 1535).

The Master found (Fdg., 113; R. 120):

> "113. On or about May 20, 1921, the Public Service Commission of the State of New York upon its own motion, instituted a proceeding entitled 'Matter of gas rates in the City of New York and suburban territory (Case No. 79)' for the purpose of investigating the rates charged by

gas corporations in the City of New York, including plaintiff, their operating expenses, revenues, service, property and investment and thereafter on August 30, 1922, filed an opinion in this case setting forth its findings and conclusions and the reasons for the making and entry of orders prescribing a calorific standard for gas and rates to be charged by certain gas corporations, including plaintiff, and upon the same day made and entered an order, wherein the said Commission fixed the just and reasonable rates to be charged consumers other than The City of New York on and after October 1, 1922, and until September 30, 1923, and thereafter until the Commission should otherwise order, and the classifications of the service to be furnished to such consumers as follows, reserving, however, the right to alter, modify or abrogate its said order.

1. First 100,000 cubic feet of gas per meter per month, $1.15 per thousand cubic feet.
2. Next 200,000 cubic feet of gas per meter per month, $1.10 per thousand cubic feet.
3. Next 300,000 cubic feet of gas per meter per month, $1.05 per thousand cubic feet.
4. Next 400,000 cubic feet of gas per meter per month, $1.00 per thousand cubic feet.
5. All over 1,000,000 cubic feet of gas per meter per month, $0.95 per thousand cubic feet." (Ibid.)

The Commission in its opinion further stated:

"Although the facts known to the Commission and confirmed by the analysis of exhibits in the conferences indicate that the rates now fixed by the Commission could hardly be deemed adequate if based only upon present conditions and present costs of manufacture, distribution, taxes, maintenance of property and return upon investment, the Commission feels confident that upon the greater stabilization of prices and the realization of certain prospective reductions in expense, the

rates hereby put in force will approach the requirements of adequacy." (R. 2090).

Appellee accepted the order and under the supervision of the Commission made changes in the appliances of its customers to make the use of gas of the new standard safe and efficient and therein expended $108,668.23 (Fdg. 115, R. 123).

The orders provided that the two orders fixing rates and standard should be in full force and effect for one year from October, 1923 and thereafter until changed and so were in effect June 2, 1893, when Chapter 899 of the Laws of 1923 was enacted. This suit was begun June 4th

Complaint.

The complaint contains the formal allegations of jurisdiction and history, the fair value of plaintiff's property used and useful in the manufacture, distribution and sale of gas in the Borough of Brooklyn, exceeding $72,000,000, that eight per cent. upon the fair value of the plaintiff's property is a reasonable return and is the rate demanded and usually realized in New York, and that the rate and standard fixed by Chapter 899 of the Laws of 1923 is confiscatory and unconstitutional (R. 10).

Answer of the Public Service Commission.

The Public Service Commission has not appealed. It, however, answered the complaint and actively participated in the hearings before the Master and District Court. It is charged by the Public Service Commissions Law with its enforcement. The Law of 1923 inserted in the Public Service Commissions Law a new section, the challenged legislation. It is the duty of the Public Service Commission if the Gas Company

should omit to do anything required of it by law to proceed by mandamus or injunction to enforce the law (P. S. C. Law, Sec. 74).

The Commission in paragraph III of its answer denies that the fair and reasonable value of plaintiff's property used and useful in Brooklyn "is $72,212,193 or any amount in excess of $36,291,581.48." Mark the exactness of the stated rate base carried down to cents. We quote in full paragraph 5 of the answer (R. 18).

> "These defendants, answering Paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of the plaintiff's complaint admit, upon information and belief, the allegations therein contained except *these defendants allege* that said orders of the said Public Service Commission of August 30, 1922, prescribing classifications and rates to be charged for gas, as in plaintiff's complaints set forth, *were based upon facts found by the Commission* in its said investigations and hearings, and that the Commission found *on the date each said order was made that the rates so fixed were just and reasonable rates* to be charged by the plaintiff to its consumers in the Borough of Brooklyn, City of New York; and in the said opinion filed by the Commission contemporaneously with the making and entering of said orders, *it was stated and determined* by the Commission that *said rates and classifications of service so fixed should be established to be effective for one year from the 1st day of October, 1922, and to continue in force until the 30th day of September, 1923, and thereafter until the Commission should otherwise order;* and with the further exception that these defendants are without knowledge as to the amount of revenue per thousand cubic feet of gas sold which plaintiff now receives under the rates prescribed and fixed by said order of the Public Service Commission of August 30, 1922, referred to in plaintiff's complaint, and therefore deny the allegations respecting said revenue per thousand cubic feet

of gas sold as set forth in said Pragraph 21." (Italics supplied.)

The especial importance of the answer is the allegation by the Public Service Commission that the just and reasonable price for gas of 537 British thermal units standard from October, 1922, to October, 1923, was $1.15 per M. cu. ft.

The Master (R. 153) states the difference in cost between 537 British thermal unit gas and 650 British thermal unit gas to be $0.0671 per M. cu. ft. This is not disputed. The answer of Public Service Commission that in its considered and matured opinion after a year's study the just and reasonable price for 537 British thermal unit gas was $1.15 per M. cu. ft. and the undisputed fact that 650 British thermal unit gas will cost 6.71 cts. more than 537 thermal unit gas is conclusive that the just and reasonable price for 650 British thermal unit gas from October, 1922, to October, 1923 and thereafter until it should change the price would be $1.21. The fair and reasonable price of a thousand cubic feet of gas with 650 thermal units in each foot was therefore $1.21 on June 1, 1923, when the law took effect and the result is a cut of 21 cents per thousand which for over 15,000,000 cubic feet sold exceeds $3,000,000. The failure of the Commission to appeal shows it has not changed its opinion.

The State of New York by its Public Service Commission in this cause alleges that $1.15 is the just and reasonable price for 537 B. T. U. gas. Its Attorney General should not be heard to dispute a fact the ascertainment of which is a function of the Commission.

Answer of the Attorney General.

The answer of the Attorney General (R. 14) is a denial of all allegations of the complaint except those made in Paragraphs 14 to 22 inclusive and Paragraphs

24 and 31. The admissions of the Attorney General are that the Legislature enacted the challenged law, that the law of 1906 prescribing the Eighty Cent rate was declared unconstitutional, that the Public Service Commission made the orders of August 30, 1922, fixing rates and calorific standard, that these orders were in force and effect when Chapter 899 of the Laws of 1923 was enacted and that the plaintiff is without adequate remedy at law.

In the ninth paragraph of his answer the Attorney General alleges that the plaintiff has not experimented with the rate fixed by the legislature and that he has no information and knowledge upon which to deny its allegations as to the cost of manufacture and distribution.

Interlocutory Injunction.

Chapter 899 of the Laws of 1923 took effect June 2nd 1923. Immediately the plaintiff moved before a court composed of Circuit Judge Mayer and District Judges Garvin and Campbell for an interlocutory decree enjoining the enforcement of the law. The motion was opposed by the Attorney General and the Public Service Commission. On July 2, 1923 the Court granted the motion and an interlocutory decree was entered enjoining the defendants from enforcing the law. (Brief, Atty. Gen., p. 2, R. 22).

The court decided a test period was unnecessary (a) because a clear case of confiscation was made out by the moving affidavits and (b) such a test was impossible because gas of the standard prescribed by the statute could not be delivered through the consumers' appliances which had been adjusted to the lower standard fixed by the order of the Commission. Upon this subject the Master subsequently found (R. 124):

> "Gas of a standard not less than 650 British thermal units cannot be furnished to the appliances

of plaintiff's consumers as at present adjusted without danger or injury to person and property. Such appliances already adjusted to comply with the order of defendant Public Service Commission must be again adjusted before gas of the prescribed standard can be safely and efficiently burned therein."

Trial Before the Master.

On October 11, 1923, the cause was referred to the Honorable Almet R. Latson, a distinguished member of the New York Bar. The trial commenced December 10, 1923 and ended July 30, 1924.

Testimony for the plaintiff follows:

James H. Jourdan, President, upon the plaintiff's operations (R. 645).

Alten S. Miller, for many years in charge of the manufacturing and operation of gas companies in New York and the West, to the reproduction cost of manufacturing plants and the reasonableness of the plaintiff's operating expenses. He further testified concerning reproduction cost in 1895 and the gas properties acquired from the seven vendor companies and their historical cost (R. 1139).

Jacob Hollander, Professor of Economics at Johns Hopkins University, as to price levels and their continuance (R. 987).

Sidney Z. Mitchell, President of the Electric Bond & Share Company, to the proper rate of return (R. 994).

Henry M. Addinsell, of the firm of Harris, Forbes & Co., New York to the cost of financing (R. 1184).

John T. White and John Waldron, to the cost of mains and services (R. 431-1035).

Henry R. Burt, Vice-President of Northeastern Construction Company, to the cost of buildings (R. 610).

William M. Greve and William R. Burling, to the market value of real estate (R. 324-326).

Donald McDonald, an officer of the American Meter Company to the cost of meters (R. 1040).

Charles B. Mount, certified public accountant, to the impossibility of finding from the books of the several vendor companies the original cost of their properties to them (R. 1192).

Nicholas Engels and David B. Stokes to the cost of cast iron pipe (R. 605-608).

Thomas P. Payne, Auditor of the appellee, to its books of account (R. 769).

Frederick R. Wogan, Assistant Secretary of the appellee, to the receipt by him of certain minute books of seven vendor companies.

Robert W. Bush, Engineer of Manufacture (R. 651), Charles C. Atwood, Assistant Chief Engineer (R. 338), Thomas P. Payne, Auditor (R. 769) and John I. Blanchfield, Assistant Auditor (R. 867), to the cost of operation.

Defendants called seventeen witnesses. Ten of them were employees of plaintiff of whom seven described the plants purchased by plaintiff in 1895.

Mr. Wolff called by the Attorney General was so discredited by cross-examination that his exhibits were voluntarily withdrawn (R. 1265).

Mr. Little, an engineer called by the Attorney General, failed to appear for cross-examination and, as a result, his exhibits were withdrawn by the Attorney General and his testimony stricken out (R. 1437).

Two witnesses called by the Public Service Commission were joint authors of a tabulation of meters from the plaintiff's books (Millar, R. 1444; Wagner, R. 1443); four testified concerning two vendor companies' books (Victory, R. 1266; Saffer, R. 1320; Crosby, R. 1304; Welch, R. 1343) and the last, Cohen, adopting the appellee's method of charging the subsidiary companies, made a methematical calculation concerning them (Cohen, R. 1328).

Reproduction Cost.

The witness, Colonel Miller, some months prior to the trial, made an inventory of all property at the manufacturing plants and station holder and to this he applied unit cost (R., 1055). The inventory is Plaintiff's Exhibit 283, R. 1952.

The plaintiff-appellee's Exhibit 283 (R. 1952) is entitled "Value of the Property of The Brooklyn Union Gas Company as of June 1, 1923". It was stipulated that this should not be printed in full but in place thereof certain pages should be printed. It was further stipulated (R. 1953):

> "It is further stipulated and agreed by the appellant, but only for the purpose of this appeal:
>
> (a) All the apparatus and foundations contained in Plaintiff-Appellee's Exhibit 283 were in existence on June 1, 1923;
>
> (b) All the apparatus and foundations set forth in Plaintiff-Appellee's Exhibit 283 were used and useful in the business of the appellee on June 1, 1923; provided, however, appellant does not by so stipulating withdraw his assignments of error numbers 45 and 46 or any other assignment in which the same or similar questions are raised or waive his right to present, brief and argue the questions of law and fact contained therein;
>
> (c) The items, quantities and total cost contained in Plaintiff-Appellee's Exhibit 283 are a correct estimate of the cost to reproduce as of June 1, 1923, each and every item on a labor, material and subcontract basis as the same is described in the testimony of Alten S. Miller; provided, however, that this stipulation does not apply to any figures contained on page 2, grand summary, entitled 'Value of (fols. 2882 and 2883) the Property of The Brooklyn Union Gas Company as of June 1, 1923,' taken from Plaintiff-Appellee's Exhibits 171A and B or any other exhibits printed in full, nor does appellant concede

> that the elements set forth in pages 3, 4, 5, 6, 7, and 8, entitled 'Notes Regarding Certain Necessary Elements of Cost in Reproducing the Property of the Company' are properly included in such an estimate of the cost to reproduce or are in the proper amount. Appellant reserves the right to contest on this appeal the propriety and the amount of any or all of such elements."

Referring to the stipulation (b) the appellant's assignment of error numbered 45 presents the question

> "that the reasonable cost for the manufacture of gas was not greater than the cost as found in Finding marked (166) of the Master's Report, for the Metropolitan Works or an average cost for the Metropolitan, Fulton, Williamsburgh and Nassau Works."

And, further:

> "that the cost of repairs at the Works and Holder Stations were excessive and that unaccounted for gas should not have exceeded five per cent."

The appellants' assignment of error 46 deals with the cost of distribution and transmission.

The stipulation (c) means that the valuations by Colonel Miller of the manufacturing plant and holder stations are accepted by the appellants. The proviso deals only with such of his figures as are taken from exhibits prepared by Mr. Burt to summarize his testimony as to the reproduction cost of buildings.

The stipulation may be summarized as an acceptance of Colonel Miller's testimony.

The witness, Burt, made an inventory and appraisal of buildings used by the appellee in its business with detailed unit cost (R., 611). The inventory is Plaintiff's Exhibit 171.

The witness, White, testified to the miles of mains and the numbers of services and their reproduction cost from his personal knowledge checked by the books of the company (R. 433).

The number of meters was proven by the plaintiff's witness, Payne, from the books of the company (R. 1685).

Throughout the opinion and report will be found references to the fact that defendants offered no evidence to meet that of plaintiff's witnesses. The ease with which this might have been done, had there been any possibility of contradiction, is recognized by the Master in his opinion:

> "Facilities were at the disposal of the defendants by utilizing the staff of trained experts, accountants and engineers maintained by the Public Service Commission at public expense and peculiarly available in such an action as this where the interests of the community are to be safeguarded. Recognizing the untiring zeal and unusual skill of counsel throughout the trial, the unmistakable evidence of careful study easily discerned in the conduct of cross examination, I am constrained to regard the absence of expert testimony traversing that of the plaintiff as justification to the court in relying upon plaintiff's evidence and regarding the same as trustworthy. This is peculiarly true in view of the fact that an expert for the defendants had prepared a voluminous exhibit and the same was introduced in evidence but subsequently withdrawn by defendants' counsel and no substitute therefor was presented for consideration. It is a fair inference that plaintiff's evidence cannot be successfully challenged except as to such matters as were developed in the cross examination. *The effect of such variations as appeared upon cross examination can scarcely be measured except by one equally qualified as the expert under cross examination. No attempt, however, was made by the defendants to fabricate these contra considerations into an opposing expert opinion.* * * *

> The Court has not the benefit of any opinion expressed by experts called by the defendants. * * * the arguments of counsel, however cogent, are not a substitute for evidence," (R. 50), (italics supplied).

We venture moreover to assert that in no similar case will the record show a readiness on the part of a plaintiff to open to defendants every possible means of proof which approaches that of plaintiff in this case. The Master commenting upon the readiness of this plaintiff to place its books and records at defendants' disposal says:

> "I know of no instance where a request by the defendants in this regard was not granted by the plaintiff." (R. 49).

Moreover, the record shows the plaintiff offering its witnesses for cross examination of the widest latitude, irrespective of the particular purpose for which the witness was called or the nature of his direct, wherever he possessed knowledge of the subject which defendants desired to develop. Of these witnesses for plaintiff the Master says:

> "No glaring inaccuracies were developed and the record contains no imputation of an attempt to mislead the Court nor any suggestion that plaintiff's witnesses were unworthy of belief or that their testimony represented anything other than their conscientious opinion with reference to the subject matter of this inquiry," (R. 49).

Summarizing the situation we then have:

1. Full and frank disclosure by plaintiff of its property and affairs;
2. Witnesses worthy of belief;
3. Zealous and skillful counsel for defendants;
4. No contradictory evidence;
5. Cross examination the result of which only an expert might fabricate and no such witness produced.

It would seem as if there existed upon this state of the record an exact parallel of the situation found by the Supreme Court of United States in the recent case of *Ohio Utilities Co.* v. *Public Utilities Commission of Ohio*, 267 U. S. 359.

That was a writ of error to the Supreme Court of Ohio on a judgment affirming an order of the Commission fixing rates which the plaintiff assailed as confiscatory and therefore in contravention of the Fourteenth Amendment. Three findings of the Commission were attacked, (1) the value of the property, (2) operating expenses including taxes, (3) the rate of return. The opinion of Mr. Justice Sutherland shows that the Commission's engineers fixed the value of the property at $154,655.93 and proceeds: "This valuation was confirmed by the oral testimony of the engineers; it was acquiesced in by the company; and we find no substantial evidence in the record to the contrary." The commission rejected and reduced several items the aggregate of which amounted to $9,600.55. This action in the absence of evidence tending to support the lower figure was held to be error. This Court reversed the judgment and restored the full amounts shown as reproduction value, using such reproduction value as present value and testing the rate by such reproduction value. Mark that undistributable structural costs were restored to the reproduction value even where the reductions were to the amounts of actual outlay, the Court saying:

> "Reproduction value, however, is not a matter of outlay, but of estimate, and should include a reasonable allowance for organization and other overhead charges that necessarily would be incurred in reproducing the utility."

Upon this subject the Master wrote (R. 49):

> "Upon the cost of reproduction of these properties as of June 1st, 1923, a vast amount of specific evidence was introduced by the plaintiff with

reference to each class of property. The testimony of witnesses was largely supplemented by exhaustive schedules and tabulations prepared for the purpose of showing how the witnesses arrived at their respective opinions and quite fully analyzing the methods of calculation employed. All such schedules will be found among the exhibits in evidence. A copy of each such exhibit was supplied to counsel for the defendants sufficiently in advance to afford opportunity for analysis with the aid of their own experts prior to cross examination. The books of record and account of the plaintiff were likewise rendered available to the defendants and their experts. It appears here and there in the record that the defendants availed themselves of this permission and that many such books and records were as matter of fact examined by or on behalf of the defendants during the progress of the trial. I know of no instance where a request by the defendants in this regard was not granted by the plaintiff. In at least one instance of major importance it appears in evidence that expert engineers employed by the defendants were actually in conference with expert engineers employed by the plaintiff concerning a voluminous exhibit which plaintiff's expert had prepared and which was introduced in evidence. The defendants Public Service Commissioners possessed such familiarity with these books and records (the exhibits being largely compilations therefrom) as would naturally flow from the exercise of their visitorial powers and from the possession of reports filed with the Commission by the plaintiff at stated intervals as required by law and by the rules of the Commission. It seems justifiable to charge these defendants with that degree of knowledge of the contents of these books and records of the plaintiff as would enable them to challenge any erroneous data introduced in evidence by the plaintiff. In the main, however, plaintiff's evidence on reproduction cost was not contradicted.

All of the witnesses were exhaustively cross-examined by counsel for the defendants and throughout the cross examination these schedules and tabulations were exhaustively analyzed. No glaring inaccuracies were developed and the record contains no imputation of an attempt to mislead the Court nor any suggestion that plaintiff's witnesses were unworthy of belief or that their testimony represented anything other than their conscientious opinion with reference to the subject matter of this inquiry."

Again the Master wrote (R. 50):

"Much of this evidence was highly technical, and the opinions were based upon a technical knowledge of the subject matter. Facilities were at the disposal of the defendants by utilizing the staff of trained experts, accountants and engineers maintained by the Public Service Commission at public expense and peculiarly available in such an action as this where the interests of the community are to be safeguarded. Recognizing the untiring zeal and unusual skill of counsel throughout the trial, the unmistakable evidence of careful study easily discerned in the conduct of cross examination, I am constrained to regard the absence of expert testimony traversing that of the plaintiff as justification to the court in relying upon plaintiff's evidence and regarding the same as trustworthy. This is peculiarly true in view of the fact that an expert for the defendants had prepared a voluminous exhibit and the same was introduced in evidence but subsequently withdrawn by defendants' counsel and no substitute therefor was presented for consideration. It is a fair inference that plaintiff's evidence cannot be successfully challenged except as to such matters as were developed in the cross examination. The effect of such variations as appeared upon cross examination can scarcely be measured except by one equally qualified as the expert under cross examination. No attempt, however, was

made by the defendants to fabricate these contra considerations into an opposing expert opinion."

The Master (R. 64) stated the items separately with this result:

	Testimony	Finding
Land	$3,451,600	$3,000,000
Buildings	7,149,685	7,000,000
Plants & Holders	15,113,366	14,500,000
Mains	19,073,210	18,000,000
Services	6,256,507	6,250,000
Meters	4,550,162	4,000,000
Equipment	653,132	600,000
Undistributed Structural Costs	21,206,775	11,000,000
Franchises	3,050,000	
Going Value....	16,055,200	
	$96,559,637	$64,350,000

Land.

The witnesses to the present value of the real estate unimproved were the Messrs. Greve (R. 324) and Burling (R. 326). They valued it at $3,451,600. The Master cut the valuation to $3,000,000, a little less than half the average. The testimony of appellees' witnesses was not contradicted. Upon this subject District Judge Campbell wrote (R. 213):

> "The plaintiff contends, and I believe properly, that the assessed values for the purpose of real estate taxation of the land and buildings as of October 1, 1922 were improperly received over its objection.
>
> No assessor was called to testify and qualified as an expert, and as I read the record, the concession of the plaintiff was only as to the fact of the assessment and not as to its admissibility.
>
> Even if the assessed values were admissible they would not furnish a safe guide either as to land or buildings, and that is especially true as to

buildings, because too many elements enter into an assessment for real estate taxation which have no place in the determination of the value of real estate, either in the case of private sale, condemnation or confiscation.

However, the cross-examination of the experts showed that in some instances the sales on which they relied, or which they claimed assisted them, warranted the Master in reducing their valuations, and I therefore accept the valuation found by him."

Buildings.

The witness to the value of the buildings was Henry R. Burt (R. 610). His testimony was not contradicted and concerning him the Master wrote (R. 54):

> "The cross examination of Mr. Burt did not result in any serious modification of his testimony and the defendants have introduced no evidence challenging or traversing opinions and calculations of this witness."

He testified $7,149,685. The Master cut this to $7,000,000.

"Buildings and Structures other than Manufacturing Plants and Stations."

Mr. Burt, Vice-President of the Northeastern Construction Company, a builder and not, as the Attorney General calls him, "a real estate expert" fixed the reproduction value at $7,149,000 (R., 613). Neither the Public Service Commission nor the Attorney General called any witness who remained to dispute this appraisal. The Master and the Court found a reproduction value of $7,000,000. The Attorney General in parallel columns contrasts Mr. Burt's estimate with the assessed valuation of nine properties (Brief, p. 41). The figures upon which this table is based are not in evidence.

District Judge CAMPBELL wrote (R., 213):

> "The plaintiff contends, and I believe properly, that the assessed values for the purpose of real estate taxation of the land and buildings as of October 1, 1922, were improperly received over its objection.
>
> No assessor was called to testify and qualified as an expert, and as I read the record, the concession of the plaintiff was only as to the fact of the assessment and not as to its admissibility.
>
> Even if the assessed values were admissible they would not furnish a safe guide either as to land or buildings, and that is especially true as to buildings, because too many elements enter into an assessment for real estate taxation which have no place in the determination of the value of real estate, either in the case of private sales, condemnation or confiscation.
>
> However, the cross examination of the experts showed that in some instances the sales on which they relied, or which they claimed assisted them, warranted the Master in reducing their valuations, and I therefore accept the valuation found by him."

So far as depreciation of these buildings is concerned, we have Finding 76 (R., 113) as follows:

> "76. From the cost to reproduce the buildings and structures there should be deducted $20,756, being the amount necessary to expend to put the same in a condition equal to new."

The Master wrote (R. 62):

> "While the amount said to be required to restore these properties to a condition equal to new may seem small, yet the evidence of Colonel Miller is not met by any evidence on behalf of the defendants. *Indeed, I have been requested on behalf of the Attorney General to make a specific finding that this amount will be required to so restore the properties.*" (Italics supplied.)

Manufacturing Plants, Stations and Holders.

The testimony concerning the value of manufacturing plants, stations and holders was given by Colonel Miller (R. 1050) concerning whom the Master wrote (R. 62):

> "Plaintiff's expert, Colonel Miller, testified that the cost of reproducing these properties as of the 1st day of June, 1923, would aggregate $15,113,366 (Plff.'s Ex. 283; R. 1953), and further testified that in order to restore these properties to a condition equal to new there would be required an expenditure of $528,368 (Plff.'s Ex. 284; R. 2016)."

The Attorney General argues:

> "Colonel Miller, appellee's expert, testified that the cost to reproduce these properties would be $15,113,000 and that it would cost $528,000 to restore them to a condition equal to new (Plaintiff's Exhibits, 283, 284; p. 1955). The Master apparently took the witness's figure in toto, finding a value of $14,500,000, although in his opinion (pp. 62-64) he admitted that some of the holders were constructed 50 years ago; in some instances even longer ago. The Court followed the Master except as hereinbefore indicated."

The Attorney General Continues:

> "Included in his estimate are 27 old gas holders all installed by the vendor companies from 1851 to 1892. The witness calculates the cost to reproduce these to be $2,739,000. They have a capacity of 12,207,000 cu. ft. The estimate is therefore at the rate of over $.22 per cu. ft. This is an exorbitant price as is shown by the price of recent installation of similar holders. In 1923 the Brooklyn Union Co. built a holder at Fifth Street having a capacity of 5,000,000 cu. ft. at a cost of $438,413, or at the rate of .08768 per cu. ft. This figure applied to the holder and capacity of these

> old holders would give a cost to reproduce without depreciation of only $1,069,696 as against Miller's figures of $2,739,000."

The facts are these: The Master found tentatively at the request of the Attorney General the facts as stated in his brief. His attention was called to the error made and he struck the finding out. The facts are that in 1923 the 5,000,000 holder was not paid for although put in use and the figure $438,413 represented only payments on account of the holder made in 1923. The balance of the cost was paid in 1924 and does not appear in the record. Appellant ascribes to Colonel Miller the figure of $438,413. and also the figure of $538,413.64 as his estimate of the reproduction cost of this holder (Brief, p. 38, Table p. 77). Neither of these figures is, as shown above, ascribable to Colonel Miller nor does this holder appear in his estimate of reproduction cost (Ex. 283, R. 1995). The twenty-seven holders average in capacity less than 500,000 cu. ft. The cost of constructing twenty-seven holders averaging less than 500,000 apiece does not compare with the cost of building one holder with a capacity of 5,000,000 cu. ft. Neither the Public Service Commission nor the Attorney General offered any evidence to contradict Colonel Miller's estimate.

The Attorney General argues that $528,000 for depreciation "is so inadequate as to become absurd". The fact is that the Attorney General requested the Court to find that this sum was necessary to put the properties in a condition as good as new and the Court made the finding at his request (Fdg. 76, 77, R. 113).

Mains.

The testimony concerning mains and services was given by John T. White (R. 438-441). The Master's very careful analysis of Mr. White's testimony (R. 56) follows:

"Cross examination revealed that the unit price adopted for materials was subject to variation, and that in the absence of an actual negotiation for the purchase of these vast quantities, there was room for more than one opinion as to the unit price which should be adopted. This was so also with reference to the labor unit. Quotations of prices from various sources were introduced in evidence by the defendants during the progress of cross examination, but varying conditions were shown to exist which make it substantially impossible for one other than an expert equally well qualified to construct a new calculation based upon some other units. The defendants have not produced such evidence, and the Court has not the benefit of the opinion of any other expert called upon to analyze the same problem by way of an attempt to traverse the method adopted and the conclusions arrived at by plaintiff's witness. Nevertheless taking the testimony as a whole, it seems to me that the result of cross examination warrants the conclusion that the unit prices of material and labor adopted by this witness were somewhat generous."

The Master cut Mr. White's estimate from $19,073,209 to $18,000,000. The Master concludes his analysis of Mr. White's testimony (R. 57):

"While the cost of installations here and there actually made by the plaintiff on or about June 1, 1923, indicate a lower unit price, the evidence also shows that these installations were under different conditions, and would be improperly comparable with the larger problem unless appropriate allowance be made for equalizing various features which differentiate the respective installations. There is no evidence in the case giving the Court the benefit of such a comparison. The witness was confronted with other estimates made by himself, one for taxation purposes, as of December 31, 1922, and another as of October 1, 1919. I have given careful attention to the ma-

terial thereby presented. I have arrived at the conclusion that the evidence upon this item fairly establishes that these mains could have been installed as of June 1, 1923, for at least $18,000,000. No allowance is here made for depreciation. The evidence was substantially to the effect that the life of these mains is unknown, and that whatever depreciation takes place is so slight that it is a negligible factor. For the guidance of the Court, the plaintiff produced a piece of cast iron pipe which had been installed fifty years ago. Experts testified upon examination of this exhibit that it showed no substantial deterioration and, for the purpose of a gas main, was as good as new. This evidence was not controverted."

Mr. White testified to reproduction cost $19,073,000 (Plff.'s Ex. 164, R. 1683). Neither the Attorney General nor the Public Service Commission offered any testimony to dispute this estimate. The Master and the Court allowed $18,000,000 (R. 58).

The Attorney General makes much of the experience of the Company during the months of June, July and August, 1923, in laying mains (Brief, p. 46). We present the results of laying mains throughout the year 1923:

During the year plaintiff laid 76,327 feet of pipe at a total cost of $211,979.96 (P. S. C. reports in evidence). Applying the labor and material unit prices of Mr. White in arriving at a reproduction cost as of June 1, 1923 to the quantity of pipe installed during that year, gives a total of $206,622.11, indicating that the particular items selected by the Attorney General and appearing in the Special Master's finding 81, are not to be taken as an indication of the cost of laying mains during 1923, or to be compared with the reproduction cost as of June 1, 1923. It will be observed that the actual cost was greater than the labor and material reproduction cost of laying these same mains, based on Mr. White's appraisal figures.

The following table shows the application of Mr. White's unit costs to the mains actually laid during 1923:—

Size	*(From P. S. C. Report) Feet Laid*	*Unit Prices on Mr. White's Exhibit 164*	*Cost of Mains Laid during 1923, based on Mr. White's Est.*
1¼"	232	$ .7892	$ 183.09
2"	2,343	.9328	2,185.55
3"	19	1.6883	32.07
4"	11,792	1.9037	22,448.43
6"	47,375	2.4287	115,059.66
8"	3,920	3.0685	12,028.52
12"	10,587	5.1014	54,008.52
20"	29	10.0340	290.99
24"	30	12.8428	385.28
	76,327		$206,622.11

During the year appellee laid 14.5 miles of mains of which it has in all 1017 miles in Brooklyn. There was therefore laid in 1923 one-ninetieth of the entire system at a cost of $211,979.96. Ninety times this amount would give the reproduction cost of the system of mains based on the experience of 1923, namely: $19,080,000. The mains selected by the Attorney General were laid in June, July and August, 1923, and are not representative. With these mains the Company had not laid governors, valves, tees, elbows, bends, and drip pots in the proportions that these are found throughout the system of the Company reducing very greatly the cost of laying the mains. Mr. White's appraisal is therefore upheld by the 1923 actual costs.

The Attorney General makes specifications of his objections:

> "1. He adopted a market price for cast iron pipe, which was purely speculative" (Brief p. 44).

The fact is that he adopted a market price for cast iron testified to by two dealers, the Messrs. Stokes (R. 605) and Engel (R. 608).

> "2. He adopted a price for his labor, purely on hearsay and above the rates of wages paid by his own company" (Brief p. 44).

Mr. White testified (R. 478) that he adopted the market price paid by Contractors on or about June 1, 1923.

> "3. His estimate of the amount of excavation that would be done by 2,200 men in the first 30 or 60 days was difficult of belief and contrary to the knowledge of the most casual observer" (Brief p. 44).

The "most casual observer" is probably the Attorney General, and his difficulties of belief are quite irrelevant.

> "4. His estimate included the digging of trenches for pipe, where the pipes were carried over bridges and placed on hangers and over the tops of subways where little or no excavation is necessary (pp. 518-519)" (Brief p. 45).

This method of estimate decreased the cost. Carrying pipes over bridges, placing them on hangers and over the tops of subways is vastly more expensive than digging a trench in the street (R. 519).

> "5. He duplicated trench after trench for long distances, that is, his estimate provided for the digging of a trench for each pipe although the pipes lay close together and in many instances one trench would suffice for several pipes (pp. 544-548) and this glaring error had to be corrected by another witness (p. 56)" (Brief p. 45).

John H. Waldron testified that the difference in cost between digging a trench for each pipe and laying all the pipes in one trench would amount to only $146,755. and this is a part of the deductions which the Master made from the estimate of Mr. White (R. 57). The Master wrote (R. 57):

> "If we take Mr. White's estimate as of January 1st, namely, $16,206,084, and deduct from it the extravagance which would have resulted from a separate excavation for each main where parallel mains were in a given street, namely, $146,755, there would remain $16,059,329."

"The estimate made by this witness as of June 1st, 1923, was $19,073,209. I deduct the allowance for economy in excavation, $146,755, making the net estimate $18,926,544.00" (R., 57).

"6. He duplicated the item for restoring the pavement over a portion of mains and services" (Brief p. 45).

The fact is that the cost of cutting pavement is part of the cost of laying the main only of course where pavement is cut. One or more years after this main is laid and the pavement cut and restored a householder abutting the street applies for a service. The pavement is cut for the service and where the service pipe joins the main there is a section cut of a small portion of pavement over the junction of main and service pipe, and to this extent and only to this extent was there such a duplication (R. 443-564).

The Attorney General here contrasts Mr. White's estimate for costs of labor with the wages paid by the Brooklyn Union Gas Company. Mr. White's estimate was based on the current market prices of the several kinds of labor. The wages paid by appellee were for steady employment the year 'round with life insurance, and wages while ill, &c. No fair comparison can be made between the wages paid for a steady year-job enabling a workman to locate near his place of employment and the wages paid by contractor for a casual job.

The Attorney General continues (Brief, p. 46):

"Mr. White estimated 1¼ inch services at a cost of $32.05 per service and the cost of installing 3-inch services at $76.60. Mr. Payne, the accountant of the plaintiff company, testified that it was the practice of the company to withdraw its 1¼ inch service at a price of $11 a service and its 3 inch services at a price of $42 a service. In accordance with the uniform system of accounts, the withdrawal of services must be made at the cost of

> installing the services, if known, and, if not known at estimated cost."

The Attorney General thus shows that the auditor of the appellee making his withdrawal entry is following the arbitrary rule of the Public Service Commission.

Appellant, in criticism of appellee's witness White, sets out a number of estimates of the value of mains made by this witness at different times (Brief, page 47).

An estimate as of October 1, 1919, is shown by the record to have covered mains then in existence at unit prices of January 1, 1914 (R., 592). With this appellant contrasts a valuation contained in a report to the State Tax Commission as of December 31, 1922. The witness explains that this valuation was made upon another basis, namely, historical cost without general contractor's profits or overheads (R. 598), while the valuations of 1923 not only included contractor's profit and overhead but was based upon prices prevailing at January 1, 1923 and June 1, 1923, respectively.

Appellant accuses the witness of a willingness to increase his estimate of the value of property as the cost of making gas goes down (Brief, p. 48). The differences between Mr. White's several valuations are entirely explained by the times as of which he took his unit prices and the theories upon which the several appraisals are made, only the last appraisals in this case being a reproduction value of property at the prices existing at the time the appraisal is made.

The Attorney General throughout his argument concerning mains and services unwarrantedly abuses the witness White. The Attorney General closes his criticism, as follows (Brief, p. 48):

> "Mr. White admitted finally on cross-examination that if he were actually going to reconstruct the *main* system he would not go about it as his esti-

> mate was made up saying (p. 560): 'If I were going to actually reconstruct the system I would put in services not at the time of the laying of mains but I am not going to actually reconstruct the system, consequently I would not do it.'
> "In reality he had no conception of what he was trying to do nor what he would have to do if he knew what he was trying to do."

The Record immediately after the portion quoted by the Attorney General contains a clear statement by this witness of exactly what he was doing (R., 561):

> "I am simply computing here the present prices of labor and material as against the quantities of labor and material that were used in building the system, using the prices that prevailed at June 1st, 1923, and reproducing, if possible, as clear as I can, what it would cost to accomplish that reconstruction at June 1st, 1923."

Services.

The Master wrote (R. 58):

> "Plaintiff's witness, Mr. White, estimated the cost of reproducing the services in use at $6,256,506.65, exclusive of charges for general engineering, contractor's expenses and profit, administrative, legal, miscellaneous general expenses during construction, interest during construction and other undistributed structural cost (Plaintiff's Exhibit 165).
>
> These services extend from the main in the highway to the curb, under the sidewalk to the building line of the consumer, and are extended upon the consumer's premises into the building. Mr. White's calculation was based upon an average length of forty-one feet as to each service. Not all of the expense of installing these services

has been borne by the plaintiff. A contribution has been made by some consumers in some cases. The status of these services and the extent to which they may be properly included within the cost of reproduction has been the subject matter of extended discussion between counsel for the respective parties. At the close of the cross-examination, the evidence on this subject may be summarized somewhat as follows. Plaintiff's books of account, since January 1st, 1909, when the uniform system of accounts was promulgated, record the expense of installing the entire service and record also the contributions received by the plaintiff from consumers; when a service is replaced the consumer makes no contribution to the cost of replacement; the pipe and all other material constituting these services were purchased by the plaintiff in the open market, and the services were installed by the plaintiff at its own expense; these installations were at the request of the consumers; some consumers paid a portion of the expense of the installations, and the custom was to charge the consumer from the house line to the meter; the practice in this regard seems not to have been uniform, but generally prevailed; there is no record showing the extent to which consumers actually contributed toward the expense of installing these services; there is no data identifying the particular consumers who may have made such a contribution and those consumers who did not, the proportion of the service pipe installed upon the land of the consumer varies and there is no record by which this can be established.

I am of the opinion that the material constituting these services having been the property of the plaintiff at the time of the installation and having been installed by the plaintiff at its own expense, at the request of the consumer, title must be deemed to remain in the plaintiff until something to the contrary be shown. The mere fact that a consumer has contributed something toward

> the expense of the installation as a whole does not enable the court to arbitrarily allot title to some portion of the service in the plaintiff and some other portion in the consumer. It has been suggested that we invoke the familiar rule to the effect that such portion of these services as was installed upon consumer's premises became a part of the freehold in each instance. It seems, however, a fair inference from the evidence that this portion of the services remained personal property, owned by the plaintiff, installed upon the premises of the consumer at his invitation and by his license,"

and concludes his analysis of the testimony (R. 60):

> "The defendants offered no evidence traversing plaintiff's estimate and calculation. Plaintiff made no allowance for depreciation of these services, although it appeared in cross-examination that obsolescence and electrolysis were factors. While it was shown that in 1912 forty-nine services were taken up because they had corroded (Page 1181), it does not appear how long these had been in use, and the ratio seems small, for while the exact number of services in the ground during that year was not shown, it does appear that there were 147,687 as of June 1st, 1923 (Plaintiff's Exhibit 165). Plaintiff's Exhibit 167, prepared by Mr. White, shows that services had been replaced, and it later appeared that many such services were replaced because the consumers required a larger pipe. If, then, the element of depreciation exists, it would seem to be negligible, particularly in view of the fact that the defendants have offered no evidence upon this subject. I fix this item at $6,250,000."

District Judge Campbell wrote (R. 212):

> "No finding deducting anything from the item for Services when the same were laid on the con-

sumer's property inside the building line can be based on the fact that some consumers had contributed an amount which was not definitely shown on account of the whole expense of installing services, because that would not be a proper deduction, the only deduction that could properly be made would be the value of the property, if any, included in that item which belonged to the consumers, and no testimony was offered to prove that title to any was in the consumer. The testimony shows that all replacements of services were made at the expense of the company, and there is no proof of their intention to give them to the consumer when they were laid on the consumer's property at his invitation and with his license."

If this Court should reverse the Court below and hold that a consumer's contribution to the installation of a service whether the contribution be large or small vested in him title to the part of the service upon his premises, the result of the litigation would not be affected. The Attorney General claims a reduction from $6,250,000, found by the Court, to $4,000,000 estimated by the Attorney General. The rate base could not be reduced by more than $2,500,000 namely from $58,000,000 to $55,500,000.

Mr. White testified that the average length of service pipe is 41 feet. The streets in Brooklyn are 60 feet wide with the exception of a few much wider and a still smaller number of less width, say an average of 60 feet. The service in the street would therefore average 30 feet and 11 feet would be on the premises of consumers. The deduction, if all consumers are held to own 11 feet of their

services, would be 11/41 of $6,250,000, or $1,676,000 which taken from $58,000,000 would leave the rate base $56,324,000.

The sole authority cited by the Attorney General for the proposition that no return should be allowed for service pipes "not owned by the company or for which the householders have paid", is *Trustees of Peekskill* v. *Peekskill Lighting and R. R. Company*, an opinion by one of the defendants, Oliver C. Semple!

In this case in the language of Commissioner Semple:

> "Contributions from consumers have been deducted by both the village and the company without any recognition of the fact that not the contribution made but the property or the work which the contribution paid for should, at the estimated cost figure, have been deducted."

Apparently the Commissioner dropped the subject with this reference to it. So far as the opinion shows there was no proof of the property for which the contributed money had paid.

In the case at bar the Attorney General failed to prove the amount of the contribution or the items or extent of the property paid for by the contribution.

It is a sufficient answer that return on such services was allowed this plaintiff in *Charles D. Newton et al* v. *Brooklyn Union Gas Company*, 258 U. S. 604.

It is confidently submitted that, where the question is what would be the cost of reproducing the system of mains and services, it is wholly beyond the point to argue that some contributions were sometimes made by some householder to the cost of installing the service.

The Attorney General (Brief, p. 57) tabulates the service as to size, number in ground, cost as withdrawn and total cost. He omits from his table the 6, 8, and 12 inch sizes and reaches the conclusion that the total cost of services is $1,825,270. This compares closely with the cost of services in the fixed capital account $2,100,600. Mr. White testified (Plfs. Ex. 165, R. 1684) that it would cost approximately three times the book cost of the service to reproduce them in the ground as of June 1, 1923, and his estimate was not challenged at the trial by either the Public Service Commission or the Attorney General.

In the words of the Special Master (R., 51):

> "Nevertheless, the arguments of counsel, however cogent, are not a substitute for evidence."

Meters.

The reproduction cost of the meters was proven by Donald McDonald, General Superintendent of the American Meter Company (R. 1041). The Master wrote (R. 60):

> "Plaintiff proved that on June 1, 1923, it had 487,745 meters and that the cost of the same new on that day would have been $4,550,162.05 (Plff's. Exhibit 166)."

The Master cut this cost, although undisputed, to $4,000,000 (R. 62).

Equipment.

This was taken from the books. Concerning it the Master wrote (R. 63):

"The book cost of equipment appears by the evidence to be $653,000. There was no evidence of reproduction value and very little with reference to depreciation. It is a fair assumption that under prevailing conditions, of which the court will take judicial notice, this equipment could not be reproduced for much less than its book value. I fix this item at $600,000."

Working Capital.

Appellant argues "A fair allowance for working capital for the appellee companies should not have exceeded $3,000,000 and the Court below erred in allowing $5,000,000" (Brief, p. 86).

Mr. Payne, appellee's auditor, put in a table which briefly was as follows:

Materials and Supplies	$2,797,692.43
Cash	4,378,096.95
Accounts Receivable Excluding Associated Companies	1,169,820.91
Prepayments	240,801.55
Special Deposits	101,020.63
Suspense	1,497,543.14
	$10,184,975.63

The Accounts Receivable represent sums due from customers; Prepayments means taxes and insurance prepaid; Special Deposits are deposits with the State Industrial Commission and the City of New York; Suspense represents gas sold and not billed and gas made and not delivered. If the whole amount of cash were deducted from the total the remainder would be $5,806,879. Some cash must be allowed and the estimate of the

appellee's witness Miller, that working capital should be at least $6,000,000, is justified and uncontradicted (R. 1072).

Appellant contends (Brief, p. 87) that the evidence presented upon this subject "was simply an addition of certain figures without the necessary analysis to show how much was needed for working capital" and that Colonel Miller, "the only other witness on this subject with the same facility as in the Consolidated case, testified to the same simple multiplication, i. e., that appellee's working capital should be 40 cents times its gas made and sold to its own consumers plus 20 cents times its gas sold to subsidiaries" (Brief, p. 88).

Mr. Payne, auditor of appellee, presented a schedule showing the actual amount of working capital carried by appellee in the years 1922 and 1923 (Exhibit 259, R., 1952) taken from accounts in the capital ledgers (Plffs.' Exhibit 254 not printed) and showing the working capital at the end of each month for the respective years, deducting amounts owing by the subsidiary companies (R., 777, 778).

Colonel Miller included in his exhibit a definition of working capital (R., 1956) and testified that if interrogated at length upon this subject by specific questions his answer would be the matters and figures set forth in the exhibit under that heading (R., 1056). On cross examination he testified at length upon this subject covering also the matter of consumers' deposits, which appellant seeks to deduct from the amount of working capital otherwise necessary (R., 1072-1076). With reference to what appellant calls "simple multiplication" (Brief, p. 88) this witness stated:

> "My figures of working capital were based on the experience over a great number of years in actual practice of gas companies, not specifically tied down to any particular unit" (R., 1074).

This fully explains the lack of any necessity that he should know the average amount of coal on hand or form an opinion as to such average amount or what oil storage capacity appellee maintained since it was possible from such experience to state definitely upon the basis of gas made what working capital was necessary for that purpose.

This is another instance where defendant Public Service Commission, with the statistics of all the gas companies in the State on file and experienced gas engineers in its employ, should, if appellee's witness was in error in stating what the Master has described as his conscientious belief, have called such experts or produced such statistics if contradictory and where its failure is corroboration of appellee's witness.

The Attorney General continues his argument (Brief p. 93):

> "Combining this figure for coal and coke with the amount shown hereinabove for the amount of materials and supplies carried at the end of an average month, to-wit: $1,469,949.97 there results as the total for material and supplies, including coal and coke, for an average month's balance over a period of two years, the sum of $2,135,035.82."

This compares with the amount stated in Mr. Payne's table for the same material and supplies (R. 1952) $2,797,692.43. Continuing his argument (Brief p. 96) the Attorney General writes:

> "The total amounts for materials and supplies and for operating expenses which, together make up the estimate of working capital are as follows:
> "Materials and Supplies $2,135,035.82
> Operating expenses ..... 1,158,046.99"
>
> $3,293,082.81.

The Attorney General entirely overlooks

Accounts Receivable, excluding associated companies	$1,169,820.91
Prepayments	240,801.55
Special deposit	101,020.63
Gas sold and not billed and Gas made and not delivered	1,497,543.14
Total	$3,009,186.23
To which add materials and Supplies as above	2,135,035.82
Working Capital	$5,144,222.05

Undistributed Structural Costs.

The witnesses were Col. Miller (R. 1114) and Mr. Addinsell (R. 1184).

The Master wrote (R. 63):

> "Colonel Miller has testified that something in excess of $17,000,000 is a proper allowance for the items, omissions and contingencies; engineering and general contractors' expenses and profits; administrative, legal and miscellaneous general expenses during construction (estimated at about two years); interest and taxes during the same period; and organization and development prior to construction. His estimate was not met by any evidence on behalf of the defendants. I am referred to many decisions by public service commissions in various states where fifteen per cent. and sometimes a little less has been allowed for overhead expenses in a reproduction cost estimate, and my attention is also called to the case of Monroe Light & Fuel Co. *v.* Michigan Public Utility Commission, 292 Fed. Rep. 149, where the estimate of the commission, fourteen per cent., seems to have been adopted for the purpose of giving the commission the benefit of every doubt, although the utilities' engineers in that case had testified that twenty per cent. was a proper allowance. We

should be required to allow at least 30% in order to justify the estimate of Colonel Miller. The authorities diligently collated by counsel for both sides lead me to the conclusion that the allowance for overhead should be somewhere between fifteen and twenty per cent. of the estimated reproduction cost, exclusive of meters. To this must be added an allowance for the cost of financing.

"Mr. Addinsell places this at a minimum of five per cent. and Colonel Miller regarded the estimate as conservative. I allow for these items of overhead and financing $11,000,000."

Totals of Reproduction Cost.

The witnesses to reproduction cost of land, Mr. Greve (R. 324) and Mr. Burling (R. 326), testified to valuations which aggregate $3,451,600. The Master received in evidence assessment rolls of the City of New York showing assessments aggregating $769,800. The Master considered both and valued the properties at $3,000,000. The evidence as to buildings and structures other than manufacturing plants and stations were given by Mr. Burt, who estimated the value at $7,149,685 (Plff's. Ex. 171, R. 1686). He further testified that it would require an expenditure of $20,756 to restore these buildings to a condition equal to new (R. 613, Plff's. Ex. 172, R. 1688). The evidence as to the value of mains was given by Mr. White described by the Master (R. 56) as

> "an expert, for many years in the employ of the plaintiff, having charge of the distribution system, including all installations, commanding a force of six hundred to eight hundred men."

He testified to a reproduction cost $19,073,209 (R. 1683). The Master cut this to $18,000,000 (R. 58). Mr. White estimated the cost of reproducing services $6,256,506.65 (R. 441). The Master cut this to $6,250,000. (R. 60).

The reproduction cost of the gas meters was given by Mr. Donald McDonald, General Superintendent of the American Meter Company at $4,550,162.05 (Plf's. Ex. 166, R. 1685). The Master cut this to $4,000,000 (R. 62). The reproduction cost of manufacturing plants, stations and holders was given by appellee's witness Colonel Miller who estimated this at $15,113,366 (Plff's. Ex. 283 and 284, R. 1955-2016). The Master cut this to $14,500,000 (R. 62). The testimony as to "overheads" was given by Colonel Miller and Mr. Addinsell a member of the firm of Harris, Forbes & Co. The Master fixed this at $11,000,000. The book cost of equipment is $653,000 (R. 63). The Master cut this to $600,000 (R. 63).

The Master found the reproduction cost of the plaintiff's property in Brooklyn to be $64,350,000 from which he deducted the proportion of the property devoted to the subsidiary Companies $6,498,090 leaving the reproduction cost of properties working for Brooklyn at $57,851,910 (R. 64).

The decree modified this finding (R. 225) as follows:

> "III. Finding numbered 108 in the report of the Special Master filed herein March 21, 1925 is modified to read as follows and as so modified made the finding of this court:
>
> > '108. The cost to reproduce the manufacturing plants, distribution system and other property owned by plaintiff, used and useful in the public service as of June 1, 1923, at the prices of labor and material then prevailing was and is, after deducting the portion thereof devoted to the use of the so-called subsidiary companies and without any allowance for working capital, at least the sum of $57,302,786 made up as follows:

Land		$ 3,000,000.00
Manufacturing plants, stations and holders		14,500,000.00
Buildings and structures other than manufacturing plants and stations		7,000,000.00
Mains		18,000,000.00
Services		6,250,000.00
Meters		4,000,000.00
Overhead and financing		11,000,000.00
Equipment		600,000.00
		$64,350,000.00
"'from which must be deducted the amounts deducted by the Master in findings Numbers 76 and 77 as necessary to restore buildings and structures other than manufacturing plants and stations to a condition equal to new	$20,756.00	
and to restore manufacturing plant, stations and gas holders to a condition equal to new, amounting in all	528,368.00	549,124.00
Total reproduction cost		$63,800,876.00

"From this total there must be deducted the value of the property owned by the plaintiff devoted to the use of subsidiary companies amounting to $6,498,090 and there remains the sum of $57,302,786 hereby found to be the reproduction cost as of June 1, 1923.'"

The Master wrote (R. 62)

"While the amount said to be required to restore these properties to a condition equal to new may seem small, yet the evidence of Colonel Miller is not met by any evidence on behalf of the defendants. Indeed I have been requested on behalf of the Attorney General to make a specific finding

that this amount will be required to so restore the properties. Upon all the evidence I fix this item at $14,500,000."

The Master found (Fdg. 77, R. 113)

> "77. From the cost to reproduce the gas manufacturing plants and stations and gas holders there should be deducted $528,368.40, being the amount necessary to expend to put the same in a condition equal to new."

We thus have a reproduction cost less the amount necessary to make the property as good as new $57,302,786. This under the rule of *Smyth* versus *Ames* is to be compared with original cost.

Original Cost.

The original cost of the property of the appellee June 1, 1923 is made up, as follows:

Historical cost of manufacturing plant and distribution system November, 1895 (Miller, R. 1237)	$23,976,790.
Land [1] (Pliff's. Ex. 297, R. 2066)	2,619,226.
Additions to Capital, November, 1895, to June, 1923 (Fdg. 31 (a), R. 97)	16,967,468
Original cost	$43,563,468.
Deduct: Property allocated to subsidiaries, 10%	4,300,000.
Original cost	$39,263,484.
Additions: June 1st to Dec. 31st 1923, (Ex. 310, R. 2091)	3,092,513.
Working Capital	5,000,000.
	$47,355,997.

[1] The land is here taken at cost. Present value is found to be $3,000,000.

Prudent Investment.

This is at least $47,355,997. or the original cost plus additions shown last above.

This is the estimated undepreciated cost of reproduction of the property of the Company on the historical basis exclusive of franchise value, going concern value, bond discount and brokerage fee.

Galveston Elec. Co. v. *Galveston*, 258 U. S. 388.

In *S. W. Tel. Co.* v. *Pub. Serv. Comm.* (262 U. S. 276, 289) Mr. Justice Brandeis dissenting from the opinion but concurring in the judgment of reversal wrote:

> "I concur in the judgment of reversal but I do so on the ground that the order of the state commission prevents the utility from earning a fair return on the amount prudently invested in it."

To this the learned Justice added Note 1 as follows:

> "1. The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown."

Colonel Miller testified (R. 1237) for the plaintiff that the cost to reproduce the physical properties purchased by the plaintiff in 1895 was $17,966,216. The index number of prices of all commodities in 1895 was 82. The average index number through the years of construction of these properties was 110. Applying these figures to the cost of construction in 1895 or $17,976,216 he testified that the physical properties ought to have

cost, on the basis of prices prevailing during the period the system and its various units were constructed, $23,976,790 (R. 1237).

Securities of Appellee Outstanding

In his Findings 35, 36, 37, 38, the Master tabulates the securities, as follows: (R. 100-101).

"Capital Stock (authorized $30,000,000.00) issued		$18,000,000.00
The Brooklyn Union Gas Co. 5% 1st Consolidated Mortgage Bonds, due 1945	$14,736,000.00	
The Citizens Gas Light Co., 5% Consolidated Mortgage Bonds, due 1940	264,000.00	
The Brooklyn Union Gas Co., First Lien and Refunding Mortgage 6% Gold Bonds, due 1947	6,000,000.00	
The Brooklyn Union Gas Co., 7% convertible debentures, due 1929.	2,000,000.00	
The Brooklyn Union Gas Co., 7% convertible debentures, due 1932.	5,579,000.00	28,579,000.00
		$46,579,000.00"

This is not disputed.

We account for bonds of $15,000,000. and stock $15,000,000. by the purchases in 1895 of the property, rights and franchises of seven vendors and the Equity Company in 1896.

July 17, 1908 the Public Service Commission authorized the issue of $3,000,000 stock at par to retire convertible debenture bonds outstanding (R. 1501). September 9, 1919 it authorized the issue of $2,000,000 debenture bonds (R. 1503).

May 10, 1922 the Commission authorized the issue by the plaintiff of $6,000,000 face value Prior Lien and Refunding Bonds and on the same day authorized the issue of $5,579,000 Convertible Debenture Bonds and a similar amount of capital stock to retire said debenture bonds upon maturity (R. 1513). On the same day the Commission authorized the subsidiaries to issue their first mortgage bonds $5,222,000 and the subsidiaries sold these bonds to the appellee at par and paid their debts to the appellee (R. 1513) in the like amount and the money subsequently went into construction of plaintiff. All this was made known to the Master in the brief of appellee.

The Attorney General argues:

> "THE OUTSTANDING SECURITIES OF THE PLAINTIFF DO NOT INDICATE A CAPITALIZATION OF OVER $35,500,000.".

Immediately following, the Attorney General sets forth the true capitalization of the appellee totalling $46,579,000. The Attorney General argues that these securities "represent, therefore, the capitalization, not only of the plaintiff Company but of all of its subsidiaries".

> "In order to arrive at what would be a fair estimate of the capitalization of the plaintiff company, the following elements should be considered: In about 1895 the Brooklyn Union Gas Company purchased the five subsidiaries above mentioned for a total cost of $5,846,530." (Brief, p. 31.)

The Attorney General quotes from the report of the Company to the Public Service Commission in 1923 (P. S. C. Reports in evidence). He argues the total bonds and stocks of the subsidiaries should be subtracted from the capitalization of appellee. It is not true that appellee paid in 1895 $5,846,530 for the subsidiary com-

panies. Appellee bought the stocks of the subsidiaries in 1896 and 1897 out of earnings for the sum set forth in the table aggregating $624,530.50 (P. S. C. Report, in evidence).

June 8, 1922, appellee bought the bonds of four of the subsidiaries for $5,222,000. The Attorney General would subtract the securities of the subsidiary from the stock, bonds and debentures of appellee. He wholly ignores the book surplus of appellee $7,504,968 and the contingency reserve $12,589,976 aggregating $20,094,945.11. The Master concludes his report concerning the contingency account, as follows (R. 80):

> "The reserve does not exist as a fund, but only as a part of the general assets of the plaintiff and is not charged into operating expenses."

In such a study of the securities of appellee as the Attorney General has attempted, surplus and reserve stand in the same class with securities outstanding.

The Attorney General argues:

> "Furthermore, an amount of about $3,000,000 ought to be allowed for loans and accounts owed by the subsidiaries, leaving a balance of about $33,500,000, as a fair and equitable estimate of the outstanding securities of the plaintiff company for the purpose of rate-making."

These are open accounts and cannot be subtracted from securities. The books showing the bonds, stock, surplus and contingency reserve and the deductions claimed by the Attorney General may be tabulated thus:

Stock, Bonds, Debentures,	$46,500,000.
Surplus,	7,000,000.
Contingencies, properly capital,	12,000,000.
	$65,500,000

SUBTRACTIONS CLAIMED.

Subsidiary bonds, ...	$5,222,000.	
Debt, open accounts subsidiaries, ...	3,000,000.	8,222,000.
		$57,278,000.
10% working for subsidiaries, ...		5,727,800.
Balance, ...		$51,550,200.

This shows an undercapitalization.

Books of Appellee.

The Attorney General argues (Brief, p. 16).

> "The real book value of the plaintiff's physical properties does not exceed $29,000,000 and the original cost of the properties is considerably less than this figure."

It is submitted there is no such thing as "real book value". The books do not record values. The entries are of costs and appellee's books as they stand show costs only and *show these accurately.* As of June 1, 1923, the total fixed capital was $49,199,133. As of December 31, 1923, was $52,894,897.78. (Fdg. 48, R. 107). The working capital of $5,000,000 is to be added to both sums.

The Master found (Fdg. 40, R. 103):

> "40. The capital stock, mortgage and debenture bonds of plaintiff were in each instance issued in consideration of money, satisfaction of antecedent indebtedness and property in amount and value apparently equal to the par value of said stock and the face value of said bonds. That such was the opinion of the board of directors of the plaintiff at the time of the transaction is indicated by the minutes of the meetings of the several

boards of directors and the reports of committees conducting these negotiations."

The Attorney General further contends (Brief, p. 29),

> "There can be no doubt that in ascertaining the book cost of the plaintiff's property we should begin with the closing entries in the vendor's books $16,254,000 and not as the Master did, start with a figure inflated by over $12,000,000 for intangibles."

The Attorney General's brief contradicts his statement of an inflation of $12,000,000 for intangibles. The difference between the vendor's ledger balance and complainant's opening balance for franchises being $1,800,000. This however is not of particular importance. The question is of the value of "the closing entries in the vendor's books". This subject is dealt with in Finding 31 by the Master (R., 97), the opening paragraph of which is, as follows:

> "31. An accountant and an engineer, qualified by experience to express an opinion upon the subject, called as witnesses on behalf of plaintiff, testified after an examination of such books of the vendor corporations as were available that it is impossible to determine therefrom the original cost of construction of the property deemed to have been acquired by the plaintiff from the said vendor corporations.
>
> Defendants for the purpose of proving the original cost of construction of said property introduced said books in evidence and called as witnesses two accountants.
>
> One of the accountants called on behalf of defendants testified that he had examined one account entitled 'Construction' of The Williamsburgh Gas Light Company for a period of eleven years, January 1, 1885 to November 4, 1895, and that, after the restoration of the amount annually charged off to profit and loss, this account shows substantially the cost of the items mentioned in it, excluding meters, services and real estate and the

items entered in four other capital accounts found in the books. This witness stated he was not prepared to swear that the account which he had examined contained the full cost even of the items contained in it. The witness thus expressly excluded mains, services and meters acquired by plaintiff in 1895 from this company and confined his testimony to the period from 1885 to 1895. The witness did not examine the operating accounts and disclaimed any knowledge of contemporary methods of accounting or the accounting methods of the particular company.

Defendants called seven employees of plaintiff who had been in the employ of The Nassau Gas Light Company, Metropolitan Gas Light Company, The Brooklyn Gas Light Company, The Fulton Municipal Gas Company, The Citizens Gas Light Company, The Williamsburgh Gas Light Company and The Citizens Gas Company respectively. These witnesses stated their recollection of the equipment in the plants on November 4, 1895.

The other accountant called on behalf of defendants examined one account of The Nassau Gas Light Company entitled Construction and testified that in his opinion this account shows substantially the cost of construction of items entered in it excluding services and meters, street mains, real estate, office building and stable building. He could not, however, state the cost of a number of items of property which the witness formerly employed by that company and called by defendants testified were in existence on November 4, 1895.

No evidence was offered by defendants concerning the books of any of the vendor companies other than The Nassau Gas Light Company and The Williamsburgh Gas Light Company.

The actual original cost of construction of property acquired by plaintiff on November 4th, 1895, cannot be established."

The appellee's witnesses mentioned by the Master in this Finding are Mr. Mount (R. 1200), and Col. Miller

(R. 1237). The effort of the Attorney General to reconstruct the books of the appellee from the books of the vendor companies as a foundation wholly failed.

The Master found (Fdg. 48, R. 107) the total fixed capital accounts of appellee as of

June 1, 1923	$49,199,133.93	
December 31, 1923		$52,894,897.78
In Finding 49 (R. 108) he adds	568,066.00	
making a total as of June 1, 1923	$49,767,199.93	
and as of December 31, 1923		568,066.00
		$53,462,963.78

The additions of $568,066. are for the Equity plant bought by appellee for $500,000 in bonds and the balance in cash.

From the above-stated sums respectively the Master deducts the portion of each devoted to the use of the subsidiaries.

As of June 1, 1923,	$6,069,968.
As of December 31, 1923,	$6,721,375.
Leaving the balance June 1, 1923	$43,697,232.
And as of December 31, 1923	$46,741,589.

The Master finds (Fdg. 49, R. 108)

> "The above sums contain no provision for working capital".

If, then, we had the working capital at $5,000,000 found by the Master (Fdg. 107, R. 117) we have

June 1, 1923	$48,697,232.
And December 31, 1923	$51,741,589.

The Attorney General makes much of the testimony of Mr. Staniford, then a clerk of appellee, before the Stevens Committee twenty years ago (Brief, pp. 19, 21, 50). Has the Attorney General forgotten that on cross-examination of Mr. Staniford he developed the fact that this witness never knew anything about the account "Plant and Patents" or the account "Franchises and Rights"? (R. 791):

> "I took the account 'Plant and Patents' as it was stated, just plant and patents. I never knew what patents were covered by that and do not know whether they had any patents or whether they withdrew any. I considered the word 'plant' meant the works of the company, the manufacturing plant, the holders, the holder station and so forth. I cannot remember whether Mr. Young told me in so many words. I cannot remember word for word what he told me. I used my own judgment, I suppose, in many of these things. I think in the course of time, Mr. Young told me many things. He was not there as an instructor. I did the work and gradually picked it up, and as I wanted information, I asked for it, and naturally absorbed a great deal. He watched me when I made these entries. I could not say that he knew I was going to carry forward his system of bookkeeping which he himself had inaugurated. I do not know what his ideas were. I did carry them out. I do not know whether he knew that he was not going to stay with the company. I cannot say that he knew he would have to explain it to somebody, but he explained all of it to me. I presume he explained the composition of every account which was in our books to me, so that I could handle them, except those that I understood without asking for information, he not feeling the necessity for imparting it. I have no recollection that he ever explained to me what the account 'Franchises and Right'—. I never knew what it meant, and I never knew what patents meant. To the best of my recollection there was an account on the books called

> 'Pierson Process.' I have rather an indistinct recollection that we had such an account. That account was subsequently ruled off. I think there was a separate account opened for Pierson Process. I am not certain but it was not in our account 'Plant and Patents'. I didn't receive any instructions as to what part of that account represented patents and what part represented plant, simply the name of the account was 'Plant and Patents'. I did not think that patents was a plant. I may have thought there was a certain portion of that account which was set aside for patents and a certain amount of it set aside to represent plant, and I may not. I cannot remember what I thought in 1895, but now I cannot tell which represents the plant, which represents the patents, which represents franchises, or which represents rights" (R. 791).

Before the Stevens Committee this witness, without the aid of counsel and without knowledge, as shown by the Attorney General in this case, led by as able an advocate as ever rose to examine a witness, gave testimony adaptable to misuse, but in the light of what the Attorney General has demonstrated in this case, utterly unyielding of fact.

The Attorney General states "the testimony of Mr. Staniford before the Stevens Committee, about twenty years ago, and not denied in this action, conclusively shows that $5,000,000 was added to the 'Plants and Patents' account for 'Good Will', at least $4,000,000 was added to the 'Street Mains' account, for special franchise, or the right to have the mains in the street, and $3,050,000 was added to the valuation of the vendor companies' property for 'Franchises and Rights', representing the right of The Brooklyn Union Gas Company to be a corporation." The testimony elicited from the same witness in this case by the Attorney General shows that twenty years ago before the Stevens Committee Mr. Staniford was utterly mistaken.

This is conclusively shown by the vendor companies' books put in evidence by defendants and by the tabulation taken from them (Plff's. Ex. 297; R. 2066). The sum of Plant and Patents on the vendor books was $9,731,384.83 and the plaintiff's opening entry $10,687,853.81, a difference of $956,468.98, less than one million rather than five as the Attorney General would have the Court believe.

Fair Value of Plaintiff's Property.

The Master's finding follows (R. 118)

> "109. The present fair value of plaintiff's property inventoried and proved to be used and useful as of June 1, 1923, is $55,000,000, exclusive of the property devoted to the use of the so-called subsidiary companies. The net cost of additions, improvements and extensions thereto used and useful in the public service and made between June 1, 1923, and December 31, 1923, amounts to $3,856,971, of which $764,458 (calculated from Pl'ffs. Ex. 310 on basis of Deft's. Ex. 46), represents property devoted to the use of the so-called subsidiary companies. Plaintiff was and is entitled to earn a fair return upon the amount of $58,092,513, so found as the value of the plaintiff's property used and useful in the public service on December 31, 1923, and *defendants offered no evidence to the contrary.*" (Italics supplied.)

The $58,000,000. is made up of fixed capital $53,000,000 and working capital $5,000,000.

District Judge Campbell on this subject wrote as follows (R. 214-216):

> "The following elements must be considered to determine fair value.
>
> Original cost not established but indicated by an analysis of the books of the plaintiff, $38,517,199.14.
>
> Book value $46,149,133.33.

Capitalization about $46,500,000, represented by outstanding stocks and bonds with a market value of $48,750,000.

Reproduction cost $57,302,786.

All the properties are serviceable and in excellent condition, although some are half a century old, some being more serviceable than others because they are more modern.

Original cost in this instance is at best but an estimate and cannot be a fair measure of value because it is too remote, and it does not seem to me that reproduction cost, as found, can be the fair value of the property, because no one would purchase physical property of the age of this property at the same price they would pay for new; therefore taking into consideration all the elements which must be considered (*Smyth* v. *Ames*, *supra*, *Georgia Railway & Power Co.*, v. *Railway Commission of Georgia*, *supra*, and *Bluefield Land & Water Co.* v. *Commission*, *supra*), I agree with the Master that the fair value of these properties can be fixed at $50,000,000 as of June 1, 1923. * * *

"I agree with the Master and allow $5,000,000. for working capital.

Adding this to $50,000,000, which I have found to be the fair value, a rate base of $55,000,000. is established as of June 1, 1923.

Between June 1, 1923, and December 31, 1923, additions were made to the capital after deducting withdrawals of the net amount in the aggregate of $3,856,971, and deducting therefrom the amount of $764,458, allocated to the use of subsidiaries, leaves $3,092,513, which added to $55,000,000, makes the rate base $58,092,513 as of December 31, 1923."

The Court found the fair value of the appellee's property was $58,000,000 made up as follows:		
Manufacturing Plant and Distribution System as of June 1, 1923...		$47,000,000
Land		3,000,000
Working Capital		5,000,000
Additions to plant, June 1st to December 31st		3,000,000
Making the fair value.....		$58,000,000
This can be justified without reference to reproduction cost, books or securities.		
The historical cost of appellee's manufacturing plant and distribution system was November, 1895.....		$23,976,790
The Plaintiff's Exhibit 255 (R. 1934) shows that the additions to plant between 1895 and 1914 were.....	$13,000,000	
from which should be subtracted for withdrawals..	4,000,000	
leaving net additions to 1914.....		9,000,000
The historical cost as of 1914 would then be		$32,976,790

Professor Hollander testified (R. 963) that the index number as of June 1, 1923 was 150 compared with a 1913 base of 100. The cost in 1923 of a plant which in 1914 cost $32,976,790 would be fifty per cent greater, or $49,465,185. The same exhibit (R. 1934) shows additions since 1914 to have cost in excess of $11,000,000. The Court would have been justified, therefore, in finding the fair value in 1923 of the appellee's property to be as follows:

1914 Historical cost manufacturing and distribution plant	$32,976,790
Add: 50 per cent	16,488,395
1923 value, 1914 plant	$49,465,185
Total since 1914	11,000,000
	$60,465,185
Subtract 10 per cent for subsidiary companies	6,046,518
	$54,418,667
Add: Land	3,000,000
Add: Working Capital	5,000,000
	$62,418,667

In the *Galveston Case* (258 U. S. 388) the Court added 33⅓ per cent to the 1913 prices. If this were followed the result might be tabulated:

1914 Historical cost manufacturing and distribution system	$23,976,790
Net additions to 1914	9,000,000
Total	$32,976,790
Add: ⅓ as in Galveston Case	10,992,230
Additions since 1914	11,000,000
Total	$54,969,020
Subtract 10 per cent for subsidiaries	5,496,902
Balance	$49,472,118
Add: Land	3,000,000
	$52,472,118
This compares with the Finding of the Master	$53,000,000
He added working capital	5,000,000
And found fair value (R. 118)	$58,000,000

The Master and the Court considered original cost, reproduction cost, the fixed capital accounts in the books and the securities. We reach the same result here by considering historical cost plus additions.

Cost of Manufacture.

Appellee has six manufacturing plants in Brooklyn. The daily manufacturing capacity, the output in 1923, the percentage, and the cost of manufacture, per thousand cubic feet, are shown in the following table:

Plant	*Daily Capacity*	*1923 Output*	*Percentage*	*Cost of Manufacture per M. cu. ft.*
CITIZENS	27,200,000	3,420,000,453	15.56	53.01c.
FULTON	13,000,000	3,298,000,361	15.	46.18
NASSAU	24,500,000	3,662,000,266	16.66	47.83
WILLIAMSBG.	30,000,000	6,114,000,612	27.31	47.09
EQUITY	2,500,000	607,061,000	2.76	58.43
METROPOLITAN	27,200,066	4,882,138,000	22.21	44.59

The Attorney General argues that the Citizens plant and the Equity plant were inefficient and concedes that the other four plants were reasonably efficient. The output of the Equity Works was so small that it can be disregarded. It would make a difference in the cost of .1125 cents. The daily capacity and the output of the Citizens plant seems to prove it efficient.

Summary of the claims of the Appellant.

The Attorney-General claims the operating expenses are summarized in the following statement (Brief, p. 129):

Cost per M. made		44.03
Cost per M. sold (unaccounted for 5%)		46.35
Distribution as found by Master	27.36	
Less miscellaneous revenue	2.24	
Net	25.12	

Deduct:				
Promotion expenses not chargeable to plaintiff (Finding No. 137)	$62,903.26			
Automobile expenses not chargeable to plaintiff's operations (Finding No. 123)	79,667.99			
Gas used chargeable to subsidiaries (Finding No. 124)	3,236.32			
Allocation of other expenses to subsidiaries on basis of actual sales and expenses in 1923	44,503.93			
Rent for lease of gas plant should be reduced to 6%	23,200.00			
Average distribution repairs 1918 to 1923 gives	89,174.36			
Total	$302,685.86			
Cents per M.			1.98	
Balance distribution, net			23.14	
General amortization			1.50	
Uncollected bills			.36	
Taxes		8.63		
Less reductions in gross earnings (See p. 17)	$24,173.00			
Reductions in Federal Income Tax	151,850.00			
	$176,023.00	1.15	7.48	32.48
Cents per M.				78.83
Net operating cost	$3,239,088.96			

Immediately following this table the Attorney General writes (Brief, p. 130):

> "This figure is arrived at, as we have pointed out above, by taking production expenses at exactly the same figure found for the comparable Consolidated Gas Company case by Judge Winslow in the District Court, by taking unaccounted for at 5% which is 15% higher than unaccounted for in the Consolidated case, by taking the distribution expenses plus uncollectibles at 23.14 cents, which is just one cent below distribution expenses found by the Special Master for the small Kings County Lighting Company and by adjusting the actual taxes of the plaintiff company only in amounts which plainly are proper."

Special Master Hoff in the *Kings County case* found that in the year ending December 31, 1923, the total operating

expenses of the Kings County Lighting Company were 91.38 cents per M. cu. ft. The Attorney General introduced in evidence a table of the operating costs of this Company (Defts.' Ex. 59, R. 2169) showing among other things the use of 2.83 gallons of oil to make 530-540 B. t. u. gas. The appellee used 3.52 gallons of oil in the same period to make 587 B. t. u. gas per M. cu. ft. increasing the cost for oil alone 3.91 cents. The distribution expenses of the Kings County Lighting Company plus uncollectible bills was not, as the Attorney General states, 23.14 cents but, as the Master found (Defts.' Ex. 59, R. 2169) 27.98 cents.

Special Master Graham in the case of the Consolidated Company states that the 1923 cost of production to be 48.45 cents and, of distribution cost to be 27.61 cents. The basic figure of the Attorney General's cost per M. made 44.03 cents is not justified by findings in either of the cases cited.

This table commences with "Cost per M. made 44.03". The actual cost as found was 49.03 (R. 145), a difference of 5 cents per M. cu. ft., accounted for as follows:

The Attorney General selects four plants out of six, the average manufacturing cost at which was 46.40, a difference of 1.36 between that and 47.76 cents the average at all six plants, to which is added the cost of operating holder stations 1.27 cents to reach 49.03 cents per M. the total cost. The two plants excluded, Citizens and Equity, used coal exclusively for generator fuel. The four plants selected used substantially equal quantities of coal and coke. Coal costs $0.75 (R. 129) per ton in excess of coke. This made a difference in cost at the two plants of .50 cents per M. cu. ft. in excess of the average of all six plants. The difference 1.36 claimed by appellant cannot exceed .86 cents per M. cu. ft.

The Attorney General next subtracts 3.07 cents from the cost of production using the 1924 oil cost. Since he purports to set forth a 1923 cost this should not appear in the Attorney General's table. It is subtracted in this brief and was subtracted by the Court to reach the 1924 cost. (R. 154).

The Attorney General also deducts .57 cents from Works Repairs to which we shall refer hereafter (Brief, p. 80). These items aggregate 5 cents.

Next the Attorney General estimates unaccounted for gas at 5 per cent. though the Master and the Court found this to be 10.57 per cent, making a difference of 3.25 cents per M. cu. ft. The Special Master found (R. 132):

> "154. In the manufacture and distribution of gas a percentage of the gas made is necessarily lost due to a variation in temperature and a difference in pressure in handling and also to leakage and condensation. In the year 1922 such unaccounted for gas of the Brooklyn Union System was eleven per cent. and during the year 1923 was 10.57 per cent. For the years from 1910 to 1923, inclusive, the average unaccounted for was 9.34 per cent. The percentage for unaccounted for gas has increased generally during the last eight years. Defendants offered no evidence to dispute the reasonableness of the amount of unaccounted for which is found to have been reasonable."

The Attorney General next deducts miscellaneous revenue, 2.24 cents per M. cu. ft. revenue from sales of appliances and other sources. The Master adds this to the one dollar rate allowed by the statute and to compare the Attorney General's table with the finding and decree this should not be deducted in the table.

The Court found the cost of manufacture and distribution of 650 B. T. U. gas for the year 1924 to be 93.56 cents (Fdg. 191, R. 153). The utmost possible deductions allowable for the items chosen by the Attorney General are the following:

Promotion expenses not chargeable to plaintiff	$36,152.91
Automobile expenses not chargeable to plaintiff's operation	17,104.41
Gas used chargeable to subsidiaries	3,236.32
Allocation of other expenses to subsidiaries on basis of actual sales and expenses in 1923	7,722.23
Average distribution repairs 1918 to 1923, gives	51,301.49
	$185,017.36

This on a spread of 15,000,000 M. cu. ft. is 1.2 cents per thousand, reducing 93.56 cents costs to 92.36 cents per M. cu. ft.

The Master found the cost of manufacture and distribution 587 B. t. u. gas 1923		92.45c.
Appellant argues this should be		78.83c.
The difference is		13.62c.
made up, as follows:		
Difference between manufacturing cost six plants of appellee and four chosen by appellant	1.36c.	
Deduction for Works Repairs	.57c.	
Difference oil cost 1923 and 1924	3.07c.	
Reduction claimed in unaccounted-for gas from ten per cent to five per cent	3.25c.	
Miscellaneous revenue deducted	2.24c.	
Claimed reduction in taxes	1.15c.	
Six claimed deductions in promotion expense, automobile expense, gas charged to subsidiaries, allocation of other expenses to subsidiaries, rent for leased gas plant, average distribution repairs	1.98c.	13.62c.

We proceed to show that these deductions should not be made.

Lower Oil Costs.

Appellant has deducted 3.07 cents from cost of manufacture basing the deduction on the price of oil in the year *following* that for which calculations purport to have been made. Not only has the Master considered this difference in finding what it would have cost to make gas in 1923 with oil at 1924 prices (R. 153) but there is the further element of difference in standard. The gas actually made contained 587 while the statute under review required 650 British thermal units. Appellee to make gas of the statutory standard must have used 4.5 gallons of oil per thousand cubic feet (R. 369) instead of 3.52 (R. 1952) at a correspondingly greater cost as shown in its exhibit 264 (R. 1952).

Works Repairs.

On the theory that Works Repairs should be averaged over a period of six years the Attorney General claims a deduction of .58 cents per M. The Attorney General refers to his argument in the Court below but does not repeat it. He doubtless now appreciates his error. In the Court below the statement was that the cost per M. of repairs at the four works selected is 3.27 cents. This is an error. The actual figure is 2.67 as shown below:

Works	*Gas Made MCF.*	*Cost of Repairs*	*Repairs Per MCF.*
Metropolitan	4,882,138	$ 90,679.58	1.85
Fulton	3,298,361	95,763.61	2.90
Williamsburgh	6,114,612	158,462.09	2.59
Nassau	3,662,266	134,862.16	3.68
Total	17,957,377	$479,767.44	2.67

The average repairs for six years is 2.70 cents per M., but cannot be calculated from the figures appearing in the Brief of the Attorney General in the Court below, which, as shown in the following table with the exception of the year 1919, are wrong:

Year	Repairs Att'y General	Repairs Actual	Gas Made MCF.	Cents per M. Made
1918	$309,400.92	$279,797.69	18,791,981	1.49
1919	375,314.50	375,314.50	18,928,231	1.98
1920	656,207.63	621,050.82	22,105,470	2.81
1921	737,624.14	677,672.91	19,223,443	3.53
1922	623,215.16	556,778.63	19,885,148	2.80
1923	850,398.00	756,130.90	21,984,891	3.44
	$3,552,160.35	$3,266,745.45	120,919,164	2.70

Following the theory of Attorney General and substituting a six year average (2.70) for the actual cost at plants selected (2.67) the cost should be increased .03 cents per M. and not reduced .58 cents per M. Thus, on his own theory, his cost should be increased .61 cents per M. (.03+.58=.61).

Transmission & Distribution Repairs.

By substituting for *actual* repairs during 1923 a six year average, the Attorney General attempts to justify a deduction of $89,174.36.

In arriving at his figure he departs from the method followed in averaging Production Repairs, possibly because that method of averaging here gives a larger figure. Repairs are as follows (Fdg. 165, R. 134; Df.'s Ex. 21, R. 2141):

Year	Sales M. Cu. Ft.	Repairs	Cents per M.Cu.Ft.
1918	13,927,282	$ 383,642.47	2.75
1919	13,725,602	352,799.67	2.57
1920	15,798,444	440,733.13	2.79
1921	13,875,504	523,830.38	3.78
1922	13,859,897	504,622.94	3.65
1923	15,300,373	548,134.67	3.58
		$2,753,763.26	3.19

The Attorney General divides the total repairs for the six year period $2,753,761.88 by 6 and takes the average annual repairs at $458,960.30. He then subtracts that sum from $548,134.67, the actual repairs for the year

1923, and reduces expenses by $89,174.36. Distribution repairs are the amounts expended to maintain mains, services, and meters. The Company having a greater quantity of mains, meters and services during 1923 than in the 6 years averaged, it required more dollars to keep the greater quantity in repair. If an average is to be considered, it should be a true average. Comparison of the totals for the years 1918 and 1923, which is what the Attorney General makes, is not an average. As shown in the table above, the average unit cost is 3.19 cents per M., which, when subtracted from the repairs for 1923, 3.59 cents (R. 146), gives a difference of .4 cents. Multiplying the 1923 sales, 15,300,373 M. Cu. Ft. by .4 cents gives $61,301.49, a figure about one-third less than results from the Attorney General's method.

Moreover the Attorney General's theory of averages assumes, ignoring higher cost of the same quantum, that the dollars of cost measure quantum of repairs, and charges that repairs were made simply to increase the expenses.

The repair bill for 1923 is higher than the previous years for three reasons: (1) the necessity of maintaining a greater quantity of property; (2) higher wages during 1923 than in the years preceding; (3) the cost of materials was greater (Plff's. Ex. 282, R. 1952). The reasons given are substantiated by the books and underlying data in evidence.

Promotion Expenses.

The Attorney General presented the same argument made before the Special Master and District Court, but without effect. (*For Master's treatment of the subject, see Opinion, R. 69—and finding 125, etc., which latter is not given effect in the findings of total costs.*)

Attorney General's argument is based on Defendants' Exhibit 171.

Actual Promotion Expense...	269,683.13
Attorney General's figure.....	206,719.87
Deduction claimed	62,963.26

Defendants' Exhibit 171 (R. 1686) shows that the Promotion Expenses for the "System" are allocated on the basis of "Gas Merchandise and Jobbing Revenue". Testimony of Mr. Payne, (R. 1029), is that the "Jobbing Revenue" part of this account bears no relation to "Promotion Expense" and hence is not a proper basis for the allocation of the latter.

Defendants' Exhibit 167 (R. 2199), in which "Gas Merchandise" stands alone as the basis of allocating the "Promotion Expenses", gives the following:

Promotion Expenses included in Operating Expenses	$269,683.13
Attorney General's figure.....	233,530.22
Based on this Exhibit the Attorney General's deduction would be	$36,152.91

or slightly more than one half of the deduction claimed by the Attorney General.

Automobile Expenses.

Appellant claims a deduction from the actual figures in these expenses of $79,667.99 made up of $17,104.41 alleged to be applicable to subsidiary companies and $62,551.83 to other than operating expense.

The latter figure includes, inter alia, charges to Materials and Supplies.

The figure of $62,551.83 referred to as "Other than Operating Expenses", includes among other things charges to "Material & Supply Accounts". If the Company followed the theory of the Attorney General, the

final cost of materials consumed in operation would not be different from the costs included in the Operating Expenses. The sole difference would be in the basis of entry. Under the Company method, the expense account shows two entries; (1) for Material; (2) for Stable Expense. The Attorney General's method first spreads the cost of Stable Expense over the materials, and when the material is used, the Stable Expense (as part of the cost of the material) is charged to Operating Expenses. It was with reference to the figure $62,551.83 that defendants' witness Cohen testified on cross-examination: (R. 1358)

> "I am neither prepared to admit or deny that my figure is correct."

The Company adopted its method in obedience to the accounting order of the Public Service Commission (Plaintiff's Ex. 244, R. 1714). The Attorney General's method is not permissible under that order.

Rent of Gas Plant.

The appellee loaned to the Newtown Gas Company, one of its subsidiaries, money to build a gasholder and has charged interest on that money at six per cent per annum. The Newtown Company rents this holder to the appellee at a rental equal to eight per cent on the cost of the holder plus taxes. The Attorney General contends that the rental should not exceed six per cent upon the money advanced. In other words, that the interest and the rental should be equal.

In calculating the income taxes assignable to subsidiary companies, Attorney General bases the tax to be assigned on a return of 8% to appellee (Defs. Ex. 156, R. 1356). He does not complain of 8% in that connection because it aids in increasing the charge to the subsidiary companies and in reducing Operating Expenses of ap-

pellee. Where the situation is reversed and appellee pays 8% for the use of property, the Attorney General finds it excessive.

With the approval of the Public Service Commission, the subsidiary companies issued against the property in question mortgage bonds, bearing interest at the rate of 6½%. The Attorney General seeks to limit a Utility to a rate of return below that which the Utility, with the approval of the State of New York, through its Public Service Commission, has guaranteed to pay.

Allocation of Expenses to Subsidiaries.

Attorney General here deducts $44,503.93 which he states to be a correction in the allocation based on "actual sales and expenses". Although the Master made a finding to that effect, the statement and the figure are contrary to the evidence.

The figure is reached as follows:

(Defs. Ex. 156, R. 2196) Amount assignable to Sub. Cos.	$586,183.18
(Plfs. Ex. 258, R. 1944) Credit applied to Operating Expenses	541,679.25
	$ 44,503.93

Defendants' Exhibit 156 (R. 2196) and the testimony in connection therewith shows that the above sum $586,183.18 includes $82,998.62 as the Subsidiary Companies share of the Income tax on the theory that the taxable earnings would equal 8% of the book value of the property jointly used. The Income tax as shown is $385,141.00 (finding 180, R. 148). The Subsidiary Companies used 12% of jointly used property (Atty. General's Brief, p. 32). Hence the Income tax assignable to Subsidiary Companies, based on "actual expenses" should be $46,216.92, and not $82,998.62. Therefore the $44,-

503.93 is reduced by $36,781.70, and the difference is only $7,722.23 and not $44,503.93.

Gas Used Chargeable to Subsidiaries.

The Attorney General makes no allowance for the cost of producing the gas consumed in operations, whether chargeable to subsidiaries or appellee. Here he applies a credit based on gas costing 49.03 cents per M. to a table where he produces it at 44.03 cents per M., but does not provide a debit (the cost) against which to apply the credit. Stated in other words, he takes out something that was never in. To logically apply this credit of $3,236.32 there should be added to the cost $31,507.16 the cost of making all the gas consumed in operations.

General Amortization.

Referring to several accounts but not to the above, the Attorney General recasts the expenses on "Actual Costs". Had the Attorney General looked into this account, he would have learned that the "Actual Costs" of property retired from service during 1923 was $525,938.32. The practice of the Company is to set aside an amount, equal to 1½ cents per M. Cu. Ft. sold, to create a reserve against which retirements are charged. The amount so included in the operating expenses during 1923 was $229,505.61 (Finding 185, R. 151).

The "Actual Costs", therefore, exceeded the amount included in operating expenses by $296,432.71, or 1.94 cents per M. Cu. Ft.

"Actual Costs", which do not aid in his argument, do not interest the Attorney General.

Taxes.

The Attorney General's figure is based on Defendants' Exhibit 157. The Exhibit disregards the Earnings

tax levied against the revenue received from the subsidiary companies. This would be proper were it not for the fact that credit appearing in Appellee's operating expenses includes reimbursement for this item. This credit appears in Finding 180, R. 147 and provision for such credit is made in Defendants' Exhibit 156, out of which Attorney General figures his surcharge of $44,503.93. Again the Attorney General deducts the same figure twice.

The Master wrote (R. 74):

> "The defendants further call attention to the fact that plaintiff has included taxes on revenue from its subsidiaries amounting to $18,140.76. (Defendant's Exhibit 155). It appears, however, that a credit for this item is found under Operating Expense Credit (Plaintiff's Exhibit 258). I therefore recast the item of Gross Earnings Tax as follows: Amount claimed by plaintiff, $133,254.33. I disallow the State tax on excess dividends, $21,600 and the tax on revenue in excess of the $1 rate, $6,029, allowing the net item $105,625.33."

Income Tax.

Attorney General deducts $151,800, part of the income tax.

The Federal Income Tax levied in 1923 and paid by the appellee was $385,141.49. The Attorney General argues (Brief, p. 128) that this should be reduced to $151,850 for two reasons:

> 1. "This income tax contains a tax upon interest obtained by the Brooklyn Union Gas Company from its subsidiary companies."

There is no evidence that the appellee paid an income tax on this bond interest and the contrary is the fact. The Tax return made by the appellee to the Federal authorities is a consolidated return for itself and its five

subsidiaries and, therein, inter-company items are eliminated. No Income Tax was levied on the bond interest paid by its subsidiaries to appellee. There is no basis for the subtraction claimed by the Attorney General.

2. During the first five months of 1923 the lawful rate under the orders of the Public Service Commission, effective October 1, 1922, was $1.15 per M. cu. ft., and during the remainder seven months the same price was collected under the order of the statutory Court granting the interlocutory injunction. The question is settled in the *Galveston* Case.

> *Galveston Elec. Co.* v. *Galveston*, 258 U. S. 388, 399.

Mr. Justice Brandeis wrote:

> "*Third.* The remaining item as to which the master and the court differed relates to the income tax. The company assigns as error that the master allowed, but the court disallowed, as a part of the operating expenses for the year ending June 30, 1920, the sum of $16,254 paid by the company during that year for federal income taxes. The tax referred to is presumably that imposed by the Act of February 24, 1919, c. 18, §§230-238, 40 Stat. 1057, 1075-1080, which for any year after 1918 is 10 per cent. of the net income. In calculating whether the five-cent fare will yield a proper return, it is necessary to deduct from gross revenue the expenses and charges; *and all taxes which would be payable if a fair return were earned are appropriate deductions.* There is no difference in this respect between state and federal taxes or between income taxes and others."

See also

> *Georgia Ry. Co.* v. *R. R. Com.*, 262 U. S. 625.

Neither defendant offered evidence as to the cost of manufacture and distribution. Of another failure to

meet appellee's evidence the Special Master wrote (R. 49):

> "The defendants, Public Service Commissioners possess such familiarity with these books and records (the exhibits being largely files therefrom) as would naturally flow from the exercise of their visitorial powers and from the possession of reports filed with the Commission by the plaintiff at stated intervals as required by law and by the rules of the Commission. It seems justifiable to charge these defendants with that degree of knowledge of the contents of these books and records of the plaintiff as would enable them to challenge any erroneous data introduced in evidence by the plaintiff."

The Attorney General offered in evidence the operating statement of the Kings County Lighting Company for the year 1923 (Deft.'s Ex. 59, R. 2169). It shows "total cost of gas sold 91.38 cents per M. cu. ft.". This exhibit shows that the Kings County Company used 2.83 gallons of oil to make 535 B. T. U. gas. The appellee Company used 3.52 to make 587 B. T. U. gas. The cost of oil to the appellee in each one thousand cubic feet of gas sold in 1923 exceeded the cost to the Kings County Company 3.91 cents per M. cu. ft. This evidence offered by the Attorney General is available to the appellee and if, as the offer presupposes the comparison is just, the appellee operated with greater efficiency and its cost of gas made and sold is proved to be reasonable.

Test Period.

A few days after the act took effect the appellee moved for an interlocutory injunction. The Public Service Commission and the Attorney General appeared in opposition. The Statutory Court granted the decree. No appeal was taken. This would seem to answer the

argument that before going to trial a test should have been made.

The Master found (F. 115, R. 123):

> "Plaintiff as soon as possible after said orders (of the Public Service Commission) became effective, adjusted the appliances of its consumers to safely and efficiently burn gas of a heating value ranging from approximately 537-550 to 600 British thermal units per cubic foot"

and further found (Fdg. 117, R. 124):

> "117. Gas of a standard not less than 650 British thermal units cannot be furnished to the appliances of plaintiff's consumers as at present adjusted without danger or injury to person and property. Such appliances already adjusted to comply with the order of defendant Public Service Commission must be again adjusted before gas of the prescribed standard can be safely or efficiently burned therein."

The Master and the Court further found the statute to be clearly confiscatory.

Separability of Statute.

The Statute is not separable so that the price may remain and the standard held confiscatory and void.

The law provides that the Gas Company:

(a) "shall not charge or receive for gas furnished or sold in such city a sum per one thousand cubic feet in excess of one dollar, nor"

(b) "furnish in such city gas of a standard less than 650 British thermal units per cubic foot, measured under normal conditions of temperature and atmospheric pressure."

(c) "The Public Service Commission, notwithstanding any other provision of this chapter, shall not allow a rate or charge in the case of such cities in excess of such sum."

The intent of the act is plain. One dollar was fixed as the price of gas with 650 British thermal units in each cubic foot. The argument of the Attorney General concedes that the price and the standard taken together make the act unconstitutional but that the standard may be discarded and the price remain. The Public Service Commissions Law provides in Article IV, Section 66, subdivision 3 that the Public Service Commission shall,

> "have power by order to fix and change from time to time standards of the purity, illuminating power and heating power and standards for the measurement of gas to be manufactured, distributed or sold".

Section 72 provides:

> "After a hearing and after such an investigation as shall have been made by the Commission or its officers, agents, examiners or inspectors, the Commission may, by order, fix just and reasonable prices, rates and charges for gas or electricity to be charged by such corporation or person, for the service to be furnished notwithstanding that a higher or lower price has been theretofore prescribed by general or special statute, contract, grant, franchise condition, consent or other agreement."

The argument is that the Public Service Commission under its power to fix standards may hereafter fix a standard which would make the price $1.00 per M. Cu. Ft. just and reasonable. The argument ignores the concluding sentence of the act under review (*supra*, p. 2).

> "The Public Service Commission, notwithstanding any other provision of this chapter, shall not allow a rate or charge in the case of such cities in excess of such sum."

The "rate or charge" refers, of course, to gas of the statutory standard 650 B. t. u's. per M. cu. ft.

The Legislative intent is the goal sought in such cases, and the Attorney General must argue that it was the intent of the Legislature that gas of a standard less than 650 thermal units per cubic foot should be furnished at One dollar per thousand. The Attorney General cites three cases in this Court:

> *Keokuk N. L. Packet Co.* v. *Keokuk*, 95 U. S. 80;
> *Poindexter* v. *Greenhow*, 114 U. S. 270;
> *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601.

The Attorney General quotes from the opinion of Mr. Chief Justice FULLER in the last case:

> "It is elementary that the same statute may be in part constitutional and in part unconstitutional and if the parts are wholly independent of each other that which is constitutional may stand while that which is unconstitutional will be rejected."

It can hardly be said that the price and the standard in the law of 1923 "are wholly independent of each other".

We add to these cases:

> *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19;
> *Dorchy* v. *Kansas*, 264 U. S. 286.

In the Gas Case, Mr. Justice PECKHAM wrote (p. 54):

> "When the objectionable part of a statute is eliminated, if the balance is valid and capable of being carried out, and if the Court can conclude it would have been enacted if that portion which is illegal had been omitted, the remainder of the statute thus treated is good."

In the Kansas case, Mr. Justice BRANDEIS wrote (p. 290):

"But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall."

The Attorney General argues that if the statute is separable the price will be $1 per M. cu. ft. fixed by statute and the standard 537 B. T. U. The Master held such a rate and standard confiscatory (Fdg. 191, R. 153). The Special Master held that 650 British thermal unit gas in 1923 would cost the Company $0.9356 and that 537 British thermal unit gas would cost $0.8685, a difference of 6.71c. The consumer, therefore, would pay One dollar for 537 British thermal units and to obtain 650 thermal units, burning this 537 gas, he must burn a greater quantity of gas and pay more than one dollar. It is submitted that this is directly contrary to the legislative intent.

Unaccounted for Gas.

The Master found (R. 132):

"151. The amount of gas unaccounted for varies from year to year and is dependent upon the weather, consumption per mile of main, condensation, and many other facts.

152. The gas supplied by the subsidiary companies is made at the works of the plaintiff and is pumped to the territory of the subsidiary companies.

153. A percentage of loss of gas occurs in the territory of The Brooklyn Union Gas Company due to the fact that it is necessary to pump gas long distances to supply the territory of the subsidiary companies.

154. In the manufacture and distribution of gas a percentage of the gas made is necessarily

> lost due to a variation in temperature and a difference in pressure in handling and also to leakage and condensation. In the year 1922 such unaccounted for gas of the Brooklyn Union System was eleven per cent. and during the year 1923 was 10.57 per cent. For the years from 1910 to 1923, inclusive, the average unaccounted for was 9.34 per cent. The percentage for unaccounted for gas has increased generally during the last eight years. *Defendants offered no evidence to dispute the reasonableness of the amount of unaccounted for which is found to have been reasonable.*" (Italics supplied).

On this subject District Judge Campbell wrote (R. 218):

> "The Attorney General contends that unaccounted for gas, that is due to leakage, condensation, expansion and contraction, among other things, should be allowed at an arbitrary figure of 5%, but I do not agree with him because in my opinion the proper method is to allow it on the basis of the companies' own records, which show the results of experience."

The Attorney General quotes District Judge Hand in *the Consolidated Gas Co. of New York* vs. *Newton*, 267 Fed. Rep., 244. We extract from Judge Hand's opinion:

> "The years 1917 and 1918 were abnormally cold and showed an unusual loss of this kind. Obviously they are not a fair specimen of the normal loss occurring from these causes. The average for the whole system over the period of 13 years during which the statistics were given to the authorities was 5.31 per cent., and, unless there are some disturbing factors, this is a valid starting point, which the company must accept."

And again:

> "The estimated average as reported by the plaintiff to the Public Service Commission for the years

1906-1918, inclusive, was 4.09, and there is a strong presumption that this is correct."

Recurring to Finding 154 (R. 132) we read that in 1922 the unaccounted for of plaintiff-appellee was 11 per cent.; that during the year 1923 it was 10.57 per cent. and for the fourteen years from 1910 to 1923 inclusive was 9.34 per cent. If the average for the fourteen years were taken the unaccounted for would be decreased 1.23 per cent. which would decrease the cost of gas by one-half a cent per M. cu. ft. The Attorney General argues that appellee should be compared with the Consolidated Gas Company. That Company serves the densest in population part of Manhattan Island. That Island has fifteen thousand acres, Brooklyn has fifty thousand.

The position of the subsidiary Companies in respect of unaccounted for may be considered. The Master found that the Brooklyn Union Gas Company and its subsidiaries constitute what is known as the Brooklyn Union System (Fdg. 118, R., 124).

> "118. Plaintiff owns all the stock of five so-called subsidiary companies, each of which distributes and sells gas to its consumers, to wit, The Newtown Gas Company, the territory of which is the 2nd ward of the Borough of Queens; The Jamaica Gas Light Company, the territory of which is part of the 4th ward of the Borough of Queens; The Woodhaven Gas Light Company, the territory of which is part of the 4th ward of the Borough of Queens; Richmond Hill and Queens County Gas Light Company, the territory of which is part of the 4th ward of the Borough of Queens and The Flatbush Gas Company, the territory of which is the 29th ward of the Borough of Brooklyn, which companies together with plaintiff constitute what is generally known as 'The Brooklyn Union System.' "

The Attorney General states, inaccurately, the finding of Special Master Graham in the prior suit of the appellee Company in which the "Eighty Cent Gas Law" was adjudged unconstitutional. Neither the report nor the opinion of Mr. Graham is in evidence but to correct the inaccuracies of the Attorney General we quote from the findings of Mr. Graham, the following:

> "(27) In the manufacture and distribution of gas a percentage of the gas made is necessarily lost, due to condensation, differences of temperature between the works and the consumers' meters, slow consumers' meters, leaks and other causes. In the year 1919 such unaccounted for gas of the plaintiff's system was 10.32 per cent. and for the first ten months of 1920 was 10.88 per cent. For the ten years from 1910 to 1919, inclusive, the average unaccounted for was 8.55 per cent. In the year 1919 the reported unaccounted for gas of plaintiff was 8.71; for the 10 years from 1910 to 1919 the average was 7.12 unaccounted for gas. The undisputed evidence was that the percentage of unaccounted for gas has increased generally during the last few years. On the evidence in this suit I find the unaccounted for gas of the Woodhaven, Jamaica, Richmond Hill and Queens County Gas Light Company to be 15 per cent. for 1919, and the first ten months of 1920; and for the Newtown, Flatbush and Brooklyn Union Gas Companies to be 10.05 per cent. for 1919 and 10.63 per cent. for the first ten months of 1920. I find these percentages of unaccounted for gas not unreasonable under all the circumstances."

The Attorney General states that since the decree was entered in this case the percentage of unaccounted for gas has been reduced to seven per cent. There is no warrant for this statement in the evidence. If he had told more of the story he would have added that the cost of manufacture and distribution increased to 95.62 cents per M. cu. ft.

Full deduction for depreciation was made by the Master.

Appellee's Operating Expenses shown in Exhibits 257-8 contain no charge for depreciation (R. 1935).

The ultimate fact to be found is the value of the property as of the time when the inquiry is made regarding the rates, and the Court is to consider

a. the original cost of construction less the cost of making buildings and manufacturing plants as good as new. As to mains, meters and services it was proven by appellee these were as good as new and no evidence was offered to contradict appellee's testimony;
b. the amount expended in permanent improvements;
c. the amount in market value of the bonds and stock;
d. the present as compared with the original cost of construction.

All these were proven and the Court below found the ultimate fact from these data. The Court deducted from reproduction cost the proven depreciation.

Certainly no deduction is to be made in estimating the prudent investment.

Quoting from the *Galveston Case* (258 U. S. 388), we have seen that the prudent investment is the estimated undepreciated cost of reproduction of the property of the Company on the historical basis, exclusive of franchise value, going concern value, bond discount and brokerage fee, but with land at its present value.

Colonel Miller testified that $528,368.40 expended upon gas manufacturing plants and stations and gasholders would put the same in a condition equal to new (R. 1123). Mr. Burt testified that $20,756 would put the other buildings and structures in condition equal to new (R. 613). The Master wrote concerning manufacturing plants, stations and gasholders that the Attorney

General had requested him to make a specific finding that $528,368.40 would wholly restore these properties to a condition equal to new (R. 62).

Of mains the special Master wrote (R., 58):

> "No allowance is here made for depreciation. The evidence was substantially to the effect that the life of these mains is unknown, and that whatever depreciation takes place is so slight that it is a negligible factor. For the guidance of the Court, the plaintiff produced a piece of cast iron pipe which had been installed (fol. 88) approximately fifty years ago. Experts testified upon examination of this exhibit that it showed no substantial deterioration and, for the purpose of a gas main, was as good as new. The evidence was not controverted."

On this subject Mr. White testified (R., 452):

> "Plaintiff's Exhibit No. 168 for identification, which appears to be a piece of pipe, I have recently seen it taken from the ground. On Monday, January 28, 1924, it was taken from the ground at Stagg Street, north side, 101 feet west of the west curb of Lorimer Street. I was present when it was removed. Prior to its removal, it was serving consumers in the line that runs along Stagg Street in this particular block between Lorimer Street and Union Avenue. This was part of a main and not a service, now serving consumers. The size of this pipe is 4 inches in (fol. 661) diameter. On January 28, 1924, it was part of a four inch main in Stagg Street, in use serving consumers. This removal was made at your request. I chose the location by going to one of the oldest record books we have which is Exhibit No. 150, and turning to page 13 of that book. I just opened the book and put my finger on the place, because the main was laid in 1858, and picked out a location under 1858 in order to get one of the oldest mains that we could for this purpose. I did not have any knowledge of its condition before the removal."

Depreciation of Services.

Mr. White testified as to services (R., 450). His testimony concerning services is shown in condensed form in Plaintiff's Exhibit No. 167 (R., 1686):

The Brooklyn Union Gas Company
Total Services in Use and Services Replaced, with Percentage Relation

Year.	*Total services in use at Dec. 31st.*	*Services replaced.*	*Percentage.*
1912 (11 Mos.)..	133,943	210	.00157
1913	135,426	243	.0018
1914	136,413	172	.00126
1915	137,537	277	.002
1916	138,606	135	.00097
1917	139,407	153	.0011
1918	139,818	105	.00075
1919	141,016	68	.00048
1920	141,932	56	.00039
1921	143,511	96	.00067
1922	146,691	96	.00065
1923	150,750	96	.00064"

Upon this subject the Master wrote (R., 60):

> "Plaintiff made no allowance for (fol. 91) depreciation of these services, although it appeared in cross examination that absolescence and electrolysis were factors. While it was shown that in 1912 forty-nine services were taken up because they had corroded (Page 1181), it does not appear how long these has been in use, and the ratio seems small, for while the exact number of services in the ground during that year was not shown, it does not appear that there were 147,687 as of June 1st, 1923 (Plaintiff's Exhibit 165). Plaintiff's Exhibit 167, prepared by Mr. White, shows that services had been replaced, and it later appeared that many such services were replaced because the consumers required a larger pipe. If, then, the element of depreciation exists it would seem to be negligible,

particularly in view of the fact that the defendants have offered no evidence upon this subject. I fix this item at $6,250,000."

Depreciation of Meters.

Donald McDonald, whose testimony according to appellant (Brief, p. 59) "is entitled to the greatest weight" had testified that he visited the repair shop and saw the meters which had been brought in and repaired and were ready again to go into the district (R. 1044). He had stated that a meter repaired as he saw the appellee's meters repaired was equivalent to a new meter (R. 1045).

The Master then asked the witness, taking all the facts stated into consideration and requisitioning his many years experience, to state what in his opinion was the life of such a repaired meter (R. 1045).

Before the witness answered counsel for the appellant interpolated the statement that such a meter "must necessarily have about twenty-five years of useful life beyond the period of repair (R. 1046).

Then the witness in answer to the Master replied:

> "I do not see any reason why, if at the end of seven years, * * * a meter were put back in first class condition again—and it can be done—why it should not renew its period of life indefinitely" (R. 1046).

Finally the witness explained his previous statement that a meter averaged thirty three years. He stated that "over a long period of years * * * there does not appear to be a replacement * * * that would indicate that the life of a meter was only thirty-three years." It seemed to him longer but, in view of the practice of removing a meter every seven years, as required by law (R. 1042), if this is done five or six times "it seems as though by that time the meter would be antiquated to some extent; conditions might have changed, a meter would have been

worn so that it would be more profitable to buy a new one than to repair it, the repairs would cost more than a new meter would cost" (R. 1048).

The sum of the testimony of this witness upon whom appellant relies and whom he made his own on this subject, for it was not entered on direct (R. 1040-1041), is that he cannot see how it can pay to repair a meter, otherwise in his own words capable of "renewing its life indefinitely" (R. 1046), more than five or six times at seven year intervals and therefore he opines it will live thirty-three years. And as to this he had said:

> "They stay in service longer apparently" (R. 1047).

From praise of his own witness on this subject appellant turns to an abusive characterisation of appellee's calling Col. Miller the Chief Priest of the New Thought School (Brief, p. 59).

Appellant does not tell how much more thoroughly than his tabulators Millar and Wagner, Colonel Miller examined the records and condition of appellee's meters (R. 1065-1069) or how, as a result of examination to find, "if it was possible, the age of meters at retirement" he testified:

> "I found that modern meters were retired about as fast as the old ones, that the age had no reference to retirement, and that was the purpose to find out that fact" (R. 1067).

Upon cross examination, Colonel Miller testified (R., 1065):

> "(fol. 1638) The price given for gas meters in accordance with Exhibit No. 166 is $4,500,162. That exhibit shows the cost new of the meters, substantially new, which the plaintiff owned on June 1, 1923. They are continually brought in and overhauled. It is a question of what you mean by 'new'. They were not bought on June 1st. You

could call them old, even if they were bought on May 30th. They would be a day old. I don't know the age of them, anyway. A meter which is registering gas properly is worth more than a new meter. I did not assume that the new meter was on the district. I assumed that the new meter was in the shop and the old meter was out on the district, properly registering gas. Under those conditions an old meter, properly registering gas, out on the district, is (fol. 1639) worth more than a new meter, regardless of the age of the old meter, if it is properly maintained, as these meters are. It would not make any difference as to the value of the meter if it had been previously repaired five or six times and if it had been properly repaired, and properly registering gas at the moment. It would be as good as a new meter. Yes; for the purpose of this company and its business, or any gas company and its business. This company does not sell its meters. That is for the purpose for which this company is using these meters or any gas company uses its meters which it purchases."

Upon this subject the Master wrote (R., 61):

Theoretical Depreciation.

Under the recent decisions depreciation can only be found if it exists in fact based on definite testimony of competent experts who have examined the structural units and speak concerning observed conditions.

Pacific Gas Co. v. *San Francisco*, 265 U. S. 403;
New York Telephone Co. v. *Prendergast*, 300 Fed. 822;
Westinghouse Electric & Mfg. Co. v. *Denver Tramway Co.*, 3 Fed. 2nd S. 285.

The Pacific Gas and Electric Company Case.

In the case of the *Pacific Gas and Electric Co.* v. *San Francisco, supra,* decided by the United States

Supreme Court on June 2, 1924, the Master had computed an "accrued depreciation", on a "life table" basis, and had adopted the "modified sinking fund method" of dealing with it and of providing for this estimated "depreciation". Mr. Justice Brandeis, with whom concurred Mr. Justice Holmes, stated that he could not say *as a matter of law* that

> "the Master and the Court erred in their *findings of fact* as to the amount of accrued depreciation".

The other seven members of the Court held that this treatment of the matter was erroneous *as a matter of law*, and that the amount of depreciation must be ascertained by actual physical observation and inspection, rather than by any estimates or computations based upon age.

As to the basis adopted by the Master in this report in the *Pacific Gas Company* case, the majority opinion in the Supreme Court said:

> "In order to determine accrued depreciation and ascertain true values during the years 1913-1916, the Master applied the 'modified sinking fund method'. Concerning this he said: It involves 'an estimate of the lives of the different structural units, and an annual allowance set aside from the rates received as a reserve for future replacement on a 5 per cent. compound interest curve, the capital basis of return to the owner being depreciated each year in an amount exactly corresponding with yearly additions to the reserve. It is assumed that loss of plant units by obsolescence and inadequacy, as well as by physical decay, can be forecast with substantial accuracy and provided for in advance of abandonment and replacement.'
>
> "*Appellant objects to the application of this method and insists that depreciation should have been ascertained upon full consideration of the*

definite testimony given by competent experts who examined the structural units, spoke concerning observed conditions and made estimates therefrom. As these examinations were made subsequent to the alleged depreciation for the definite purpose of ascertaining existing facts, *we think the criticism is not without merit. Facts shown by reliable evidence were preferable to averages based upon assumed probabilities.*" (Italics supplied).

In approving the principle that accruals or provision for retirements of property need not be made in advance, by burdens on the rates, but should be paid for out of the economies realized and thus affect only the rates charged to the future consumers for whose benefit the retirement is made, the Supreme Court said:

> "Obviously, under the theory accepted below, appellant worsened its situation for rate-making purposes when it reduced the cost of manufacturing gas. Introduction of successful patented inventions enabled the public authorities to lower the rate base and gather all the benefits. The operating plant, made capable of producing gas at smaller cost was declared less valuable than before. The result indicates error somewhere, either in theory or application of principle.
>
> "Obsolescence of one or more stations and perhaps other property theretofore of great value (possibly $800,000) followed installation of the patents, but the remaining plant plus the patents gave better results. As an operating unit the new combination had greater value than the old; but the Court below disregarded the demonstrated worth of the element which wrought this change.
>
> "The obsolescence in question did not result from ordinary use and wear. Certainly it could not have been long anticipated—the patents were of recent conception; to provide for it out of previous revenues was not imperative, if possible. Former consumers were not beneficiaries; only subsequent ones could be advantaged."

The New York Telephone Company Case.

In the case of the *New York Telephone Co.* v. *Prendergast* (300 Fed. 822), decided July 26, 1924, by a Court composed of Hough, C. J., and Knox and Winslow, D. JJ., the New York Public Service Commission, in determining the fair value of the plaintiff's property, had deducted the entire book reserve for depreciation, but the Court held that the Commission had erred, saying in part:

> *"The legal error is in not recognizing that the law requires deduction only for actual depreciation, just as actual as the present value, and the extent of that depreciation must be ascertained by the same kind of evidence; in the last analysis opinion based on contemporary investigation."*

The Denver Tramway Case.

In the *Denver Tramway* case, *supra,* Circuit Judge Lewis decided that it was erroneous to base a deduction for depreciation on the age or estimated life of the property. The Court held that:

> "In valuation of street railway property for rate making purposes accrued depreciation is a fact to be ascertained by inspection."
>
> *Nashville C. & St. L. R. Co.* v. *United States,* 269 Fed. 351, 356.

> "The testimony, considered as a whole, tended to support the conclusion that the amounts expended by defendant during the years in question for repairs, renewals, and replacements should and would have fully offset the depreciation in the various units, and that the defendant's railway and structures were, as a whole, maintained throughout the years in question in fully as good condition, and were of fully as great instrinsic value, as at the beginning of the respective years.

> The jury would have been clearly justified in inferring from the testimony of defendant's chief engineer, taken as a whole, that the value of the roadway had not depreciated during the two years in question; in other words, that the repairs and renewals that had been made were of such a character as to leave the road at the end of each year of value equal to that at the beginning of the year. That officer's testimony so impressed the trial judge, who stated his opinion from the evidence that 'there is no reasonable deduction for depreciation established.' Defendant did not directly controvert the situation so shown. Its chief, if not its only reliance, seems to have been on the proposition that, in spite of it all, there was inevitable annual depreciation in some of the perishable elements not entirely renewed or replaced, so justifying the contention that for this reason there was depreciation within the meaning of the act, even though the roadway as a whole had not decreased in value. To this argument, as already said, we cannot assent. It follows that the trial judge rightfully refused to instruct verdict for defendant."

Upon this subject Judge Campbell wrote (R. 211):

> "The defendants now claim that the Master erred in not making deductions for depreciation as to the several items making up the cost of replacement, but I cannot agree with them, because if they desired such a finding, the defendants, with the large corps of experts under their control, could have easily shown the fact, if such it be, and the basis on which depreciation should be figured, and having failed to make any such showing, they cannot complain because the Master failed to make such findings, as it appears to me that in his finding of a fair value much lower than the cost of replacement as found by him, he must have made all the allowance for depreciation that was warranted by the evidence."

Contingency Reserve.

The Attorney General contends that the so-called Contingency Reserve should be exhausted in payment of losses by inadequate rates before asking for relief. This is part of the earnings of the Company under rates fixed by the Legislature and withheld from stockholders.

The Special Master wrote (R., 79):

Contingency Account.

"It appeared in evidence that plaintiff maintains upon its books a contingency account designed as a protection against unusual losses, calamities or expenses. In establishing this account the Board of Directors of the plaintiff corporation passed a resolution substantially to the effect that nothing should be charged against this account unless (fol. 116) specifically approved by the Board. This account now amounts to approximately $13,000,000. It is urged by the learned Attorney General that even though operation under the statute may fail to yield an income to the plaintiff, yet this will not constitute confiscation of plaintiff's property until, by virtue of the losses so incurred through operation under the statute, this contingency fund shall have become exhausted. I am unable to concur in this view. The reserve represented by this account is the property of the plaintiff. In the exercise of their discretion the Board of Directors have chosen thus to safeguard the capital investment of the stockholders against an unforeseen calamity. In the exercise of that same discretion it would be competent for the Board to reduce the reserve, recognizing that it is after all an accumulation of undistributed profits, and declare a dividend payable out of the same. Indeed the expense of maintaining this litigation and the expenses incurred through the readjustment of appliances upon consumers' premises necessitated by the order of the

> Public Service Commission of August 30, 1922, might with propriety and in the exercise of that discretion be charged against the same. I am unable to discern by what authority the State may confiscate a surplus and yet be deterred from confiscating capital. It is certainly true that if the cost of manufacturing and distributing gas were unconscionably increased or the apparent earnings of the plaintiff were unconscionably decreased by the maintenance of an extravagant contingency reserve charged into operating expenses, this might be the proper subject of judicial review. No evidence, however, has been submitted to me tending to show such a condition of affairs. The reserve does not exist as a fund, but only as a part of the general (fol. 117) assets to the plaintiff, and is not charged into operating expenses" (R., 80).

Concerning this, District Judge Campbell wrote (R., 221):

> "The defendant Attorney General seems to have dropped the contention he made before the Master that there could be no confiscation until the plaintiff had exhausted its contingency account in making good any losses incurred by operating under the statute, and therefore the question needs no further discussion and I will content myself with saying that I am in entire accord with the opinion of the Master that to take any of this account is to take the property of the plaintiff and would be confiscation."

This subject was discussed before this Court in the *Eighty Cent Gas* case (March 9, 1921) and we have printed as an appendix to this brief the argument of Mr. Donnelly, of counsel for one of the defendants, and the statements of the Justices of the Court.

Structural Overheads.

The Attorney General argues (Brief, p. 63):

> "There is no justification for any allowance for 'structural overheads' beyond those appearing in the books and included in so-called investments."

Colonel Miller estimated structural overheads at $17,000,000 (R., 1097 et seq.). The Master allowed $11,000,000 for structural overheads and cost of financing. Mr. Addinsell, a member of the firm of Harris, Forbes & Co., testified to the latter element (R., 1184). It is settled in this Court that structural overheads and cost of financing are to be included in the cost of reproducing property as a matter for estimate.

> *Ohio Utilities Co.* v. *Pub. Utilities Comm.* (267 U. S. 359).

In that case the Commission among other things rejected outright the item of $5,000 for preliminary organization expenses and reduced interest during construction from $4,507.98 as estimated and recommended to $1,500 a reduction of $3,007.98. Mr. Justice Sutherland wrote:

> "The item of $5,000 seems to have been rejected upon the ground that there was no proof of actual expenditure. Reproduction value, however, is not a matter of outlay, but of estimate and should include a reasonable allowance for organization and other overhead charges that necessarily would be incurred in reproducing the utility. In estimating what reasonably would be required for such purposes, proof of actual expenditures originally made, while it would be helpful, is not indispensable. * * * That such expenditures in a substantial amount would necessarily be made in reproducing the utility is clear; it is not suggested

> that the estimate of the engineers is excessive or unfairly made; and the rejection of the entire amount cannot be regarded as otherwise than arbitrary."
>
> "The reduction of the item for interest seems to be of like character. The engineers estimate was based upon their conclusion that it would require one year for the construction of the plant; and interest at six per cent was allowed on the estimated cost for half of that period. There is no justification in the record, so far as we can see, for a reduction of the item to an amount which is less than one-third of the engineers' estimate."

Neither the Public Service Commission nor the Attorney General called any witness to dispute the estimates of Colonel Miller and Mr. Addinsell.

The Attorney General argues that "overheads" should not exceed their book cost.

Prior to 1909 no overhead costs were entered on the books of the appellee. Subsequent to 1909 the books were kept in obedience to the Uniform System of Accounts prescribed by the Public Service Commission of the State. We quote from the rules of the Public Service Commission (Plff's. Ex. 244, R., 1734):

> "(G281). ENGINEERING AND SUPERINTENDENCE. Charge to this account all expenditures for services of engineers, draftsmen, and superintendents employed on preliminary and construction work, and all expenses incident to the work, when such disbursements cannot be assigned to specific construction."

There are other like rules compelling a charge for overheads to be made to specific construction and not separately charged. Another rule of the Commission is (Ib., 1736):

> "(G286). MISCELLANEOUS CONSTRUCTION EXPENDITURES. Charge to this account the salaries

> and expenses of executive and general officers of a gas plant under construction; clerks in general offices engaged on construction accounts or work; rent and repair of general offices when rented, with the office expenses; insurance during construction; also all construction and equipment items of a special and incidental nature which cannot properly be charged to any other account in this classification."

These quotations will show the irrelevance of the table of the Attorney General (Brief, p. 69).

Rate of Return.

The Master held there should be an eight per cent. return upon the fair value of the property devoted to the public use by the appellee. (R. 154).

The finding was made upon the testimony of Mr. Sidney Z. Mitchell, President of the Electric Bond & Share Company, a leading public utility company in the country (R. 994). Neither the Public Service Commission nor the Attorney General offered any evidence to contradict Mr. Mitchell.

The question is really academic for the actual return found by the Master is 2.364 per cent. upon the fair value found by him (R. 153). A return of six per cent. was held to be a constitutional compensation in 1908 in the Borough of Manhattan, City of New York for the Consolidated Gas Company.

Willcox v. *Consolidated Gas Co.*, 212 U. S. 19.

Mr. Justice PECKHAM wrote (p. 48):

> "There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and

locality; among other things, the amount of risk, in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which in some cases might also be properly taken into account in determining the rate which an investor might properly expect or hope to receive and which he would be entitled to without legislative interference. The less risk, the less right to any unusual returns upon the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return without legislative interference, than can be obtained from an investment in Government bonds or other perfectly safe security. The man that invested in gas stock in 1823 had a right to look for and obtain, if possible, a much greater rate upon his investment than he who invested in such property in the city of New York years after the risk and danger involved had been almost entirely eliminated.

In an investment in a gas company, such as complainant's the risk is reduced almost to a minimum. It is a corporation, which in fact, as the court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the city of New York would, for purposes of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply. And, so far as it is given us to look into the future, it seems as certain as anything of such a nature can be, that the demand for gas will increase, and, at the reduced price, increase to a considerable extent. An interest in such a business is as near

> a safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time that there is a possible element of risk, even in such a business. The court below regarded it as the most favorably situated gas business in America, and added that all gas business is inherently subject to many of the vicissitudes of manufacturing. Under the circumstances, the court held that a rate which would permit a return of six per cent. would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the city of New York.
>
> Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent. on the fair value of its property devoted to the public use."

The Gas Company, there, however, monopolized "the gas service of the largest city in America and is secure against competition". That meant it monopolized the lighting service which is not true today. The Master found (Fdg. 147, R. 130):

> "At the time of the organization of plaintiff and commencement of business all gas was used for lighting and almost none for any other purpose. The use of gas for lighting has almost disappeared and its present use for cooking, heating and industrial purposes has been completely developed by the new business department of the various gas companies including that of this plaintiff."

To illustrate the use for heat we quote from the Master (Fdg. 111, R. 119):

> "The maximum day's sendout during the winter of 1923-1924 was 94,944,000 cu. ft. on January 21, 1924, an increase over sendout of the preced-

> ing day of 43% due to a drop in atmospheric temperature from 31 degrees to 8 degrees F."

Over half of the light service in Brooklyn has been taken from appellee by the active, constant competition of electricity. The bulk of appellee's business is for heat and power. Here it has always been in competition with coal and now oil is being used for heat and power and is a strong competitor with gas. The future of the Company is surely in the field of heat and power.

There is another reason for eight per cent. now as against six per cent. in 1908. Professor Jacob Hollander, of Johns Hopkins University, testified that taking 1913 as a basis of 100 the index of commodity prices June 1, 1923 was 150 (R. 963). The equivalent in 1923 of six per cent. in 1913 was therefore over nine per cent.

In *Lincoln Gas Co.* v. *Lincoln*, 250 U. S. 256, 267 it is written:

> "We cannot approve the finding that no rate yielding as much as 6 per cent. upon the invested capital could be regarded as confiscatory, in view of the undisputed evidence, accepted by the Master, that 8 per cent. was the lowest rate sought and generally obtained as a return upon the capital invested in banking, merchandising, and other business in the vicinity; 7 per cent. being the 'legal rate' of interest in Nebraska. Complainant had not such a monopoly nor were its profits 'virtually guaranteed' in such a sense as to permit the public authorities to restrict it to a return of 6 per cent. upon its invested capital."

And again, p. 268:

> "It is a matter of common knowledge that, owing principally to the world war the cost of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that

annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future."

Bluefield Land & Water Co. v. *Pub. Serv. Comm.*, 262 U. S. 679.
Southwestern Bell Telephone Co. v. *City of Ft. Smith*, 294 Fed. 102.

That was an action by the plaintiff Telephone Company against the City to enjoin it from putting into effect certain ordinance rates for telephone service. The District Judge wrote (p. 107):

"(3) The city also contends that a rate may not be fair, so as to afford to the utility an adequate return; but such fact does not render it confiscatory. In the Bluefield Case, above referred to, the court said:

'Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.'

"Therefore this contention of the city cannot be sustained."

And, again (p. 108):

"By allowing a valuation of $685,605, which includes a going value of 10 per cent., and by reducing the annual depreciation to 4 per cent., the city shows a return of 6.29 per cent. Its engineer admits that a fair return would be 8 per cent. The attempt to impose ordinance rates which admittedly will not produce a fair return on the value of the property devoted to public use is the

taking of property without due process of law under the Fourteenth Amendment. Therefore the preliminary injunction will be made permanent."

This judgment was affirmed by this Court, January 25, 1926 (see U. S. Supr. Ct. Adv. Shts., No. 8, p. 236).

Going Concern Value.

Colonel Miller testified that going concern value of appellee was $16,055,200. (R. 1064). The Master found (Fdg. 110, R. 119):

> "Going concern value exists in the instant case. I fix that value at $6,000,000. I have not included this item in reproduction cost, nor in adopting a rate base, for the reason that even without such an allowance the statute is clearly confiscatory."

District Judge CAMPBELL wrote (R. 215):

> "I am of the opinion that there is a going value to the property of the plaintiff, and while it may be greater, I do not feel that on the evidence offered in the case at bar it could be fixed at more than $6,000,000, if on the evidence it could be fixed at any specific sum; and if there was something for going value included in the price paid by the plaintiff, in its stocks and bonds, to the vendor corporations in November, 1895, it is more than covered in this amount.
>
> Therefore, it seems to me that the Master was right in eliminating any allowance for going value in the case at bar, in ascertaining reproduction cost or in adopting a rate base, and I shall follow that course in the belief that by so doing the rate base as found by me is established beyond a reasonable doubt."

The learned Judge is correct in his assumption that by excluding $6,000,000 found to be the going concern value the rate base "is established beyond a reasonable doubt".

It is submitted however that the price paid to the vendor corporations by appellee in 1895 is wholly irrelevant to the reproduction cost of the appellee's property in 1923 and that the going concern value should be added. (*So. West. Bell. T. Co.* v. *Ft. Smith*, 294 Fed. 102, aff'd U. S. Supr. Ct. Adv. Shts. No. 8, p. 236). In that case a going concern value of ten per cent was allowed. If that percentage were applied here the going concern value would be ten per cent of $57,302,786, the cost to reproduce the properties of appellee used and useful in the Borough of Brooklyn alone, or $5,730,278. The Master's finding of $6,000,000 is therefore fully supported by the decree in the *Ft. Smith Case*. It should have been added to the rate base.

Eighty Cent Rate Case.

In 1921 this Court affirmed the judgment in "*Newton, Atty. Gen.* v. *Brooklyn Union Gas Company*, 258 U. S. 604".

The Special Master in that case in his opinion wrote, in part, as follows:

> "In 1918 the rate base was not fully proven, as it did not include the floating capital. This was claimed to be $5,950,706.23 in 1919 and $6,337,988.66 in 1920.
>
> Excluding floating capital and making deductions on account of subsidiary companies and the City of New York, I have found a rate base for 1918 of $28,953,870.27, and a net income of $1,013,062.61, or a net return of 3.50 per cent.
>
> For 1919 I have found a rate base of $27,916,448.42, and a net income of $256,755.69 or a net return of 0.92 per cent.
>
> In 1920, for the first ten months, which was the only complete period shown, there was a net loss on operation of $483,494.12, or 2.89 cents per thousand cubic feet of gas sold.

> Obviously, a return of 0.92 per cent. is not a fair and reasonable return. The same might be observed in regard to the 1918 return of 3.50 per cent., and I think it should be repeated that in arriving at that figure the Master made no allowance for working capital, because the proof on that point was not completed." (Transcript of record October Term 1921, No. 671 Newton *v.* Bklyn. U. Gas Co., p. 68a).

And further wrote:

> "I have reviewed the questions presented at considerable length in order that the court might have a full view of the situation in which the plaintiff company finds itself on its application for equitable relief.
>
> I think the evidence shows steady and increasing decrease in the return to the plaintiff on its investment. From the return from operations in 1918 of only 3.50 per cent., calculated on only a portion of its investment, it fell to 0.92 per cent. in 1919, and in the first ten months of 1920 showed not only no return, but an actual loss of 2.89 cents on every thousand cubic feet of gas delivered. I have assumed an investment at an amount which I believe to be very greatly below its actual value in each of the years named. It was so low that the defendants apparently were well content to leave it alone and made practically no attempt to controvert it. Since the various assessments were made, the plaintiff company has put into the plants substantially two and a half million dollars for extensions and additions" (Transcript, p. 69a).

Obviously, the smallest rate base was sufficient for the purposes of the plaintiff in that action and to avoid the enormous expense of inventory and appraisal it called to the stand the tax officials of the City of New York and asked their opinion as to values which naturally coincided with the assessed value and it also called the tax officials of the state of New York who had assessed for

taxation the special franchise of the plaintiff to wit, the mains in the street, and took their opinion.

Answering the Attorney General's contention (Brief, p. 133) that there would be little if any danger connected with changing to the statutory standard even without adjustment of appliances.

The argument of the Attorney General depends upon a table (Brief, p. 134). The Attorney General argues:

> "The record of average candle power at the works with the corresponding approximate B. t. u. content was as follows:

then follows, for 1920 and 1921 in parallel columns, candle power and assumed B. t. u.'s. The citation is to the testimony of Mr. Atwood, Assistant Chief Engineer, giving the candle power alone. The B. t. u. content is taken from the imagination of the Attorney General. We have already shown that Mr. Atwood testified he could state no relation between candle power and thermal content. The City tests, tabulated by the Attorney General, were utterly discredited in the *Eighty Cent Gas Case*. It is true, as Mr. Atwood testified, that in 1920 and 1921 the appellee delivered a poor quality of gas because of the impossibility of getting sufficient quantities of gas oil. It is also true that the Company's consumers had great trouble because of this low standard, but this does not even tend to disprove the finding of the Master that (R. 144)

> "gas of a standard of not less than 650 British thermal units cannot be furnished to the appliances of plaintiff's consumers as at present adjusted without danger or injury to persons and property. Such appliances already adjusted to comply with the order of defendant Public Service Commission must be again adjusted before gas of the prescribed standard can be safely or efficiently burned therein."

Incomplete Case.

Appellant (Brief, p. 81) contends there has been a failure of proof by appellee upon the subject of depreciation constituting an "incomplete case" and asks either that the case be sent back for further proof upon this point or in default of this "the Company's own estimate" of $12,000,000 be deducted from the rate base.

Upon the first proposition there has been no failure of proof. The Master, commenting upon the readiness of appellee to place its books and records at appellant's disposal, says:

> "I know of no instance where a request by the defendants in this regard was not granted by the plaintiff" (R. 49).

Moreover the record shows the plaintiff offering its witnesses for cross examination of the widest latitude, irrespective of the particular purpose for which the witness was called or the nature of his direct, wherever he possessed knowledge of the subject which the defendants desired to develop. Of these witnesses the Master says:

> "the record contains no imputation of an attempt to mislead the court nor any suggestion that plaintiff's witnesses were unworthy of belief or that their testimony represented anything other than their conscientious opinion with reference to the subject matter of this inquiry" (R. 50).

Summarizing the situation we then have:

1. Full and frank disclosure by appellee of its property and the condition of its property.
2. Witnesses worthy of belief.
3. Counsel for defendants described by the Master as zealous and skilful.
4. No contradictory evidence.

5. Cross examination the result of which only an expert might fabricate and no such witness produced. (R. 50).

All the authorities now agree depreciation must be observed by competent persons who testify to their observation. Appellee produced not only competent experts but upon the subject of mains a section of pipe long in the ground and chosen at random (R. 452). Each of these witnesses and in fact several others fully acquainted with appellee's property were at the disposal of the defendants for cross examination upon any subject defendants chose. Appellee's witnesses, paraphrasing the words of the Master, testified positively to their conscientious opinion with reference to the subject of depreciation and were unshaken on cross examination. Appellee's case upon this subject cannot be called incomplete in the light of this testimony and on the contrary, in the state of the evidence, it was the duty of the Public Service Commission, with the facilities at its disposal to utilize the staff of trained experts maintained by it at public expense and peculiarly available in such an action, to testify to their knowledge concerning appellee's property. The failure of the defendant Commission to produce these witnesses justifies a finding that their observation had disclosed no depreciation.

Appellant offers an alternative in the deduction from the rate base of $12,000,000 represented by the so-called contingency account. It is his contention (Brief, p. 82) that "the creation of this reserve is evidence of the company's own measure of depreciation." In former cases representatives of the public have sought to persuade courts and commissions that the company must live upon an alleged fund called contingencies and could not assert the unconstitutionality of a given rate until such alleged fund had been exhausted. This argument as shown elsewhere herein has been repudiated upon each occasion

when it was raised. Now it is given a new twist in an effort to establish that it is the company's own measure of depreciation. The argument that an amount, belonging to stockholders, the enjoyment of which they have been willing to forego in the creation of a reserve entirely devoted to extensions and additions, should be deducted from the value of that property as a measure of unobserved and theoretical depreciation, is more fallacious than the former argument that the company must live upon this imaginary fund during periods of stress.

Comparison of Rates.

The appellant states (Brief, p. 11):

> "The appellee company was free to fix its own rates without regulation from May 14, 1921 to Oct. 1, 1922."

This is not true. The decree of the United States District Court in the 80 Cent Gas Case, *Newton et al.* v. *The Brooklyn Union Gas Company,* entered May 13, 1921, provided:

> "Nothing contained herein shall be construed to limit, prejudice or restrict such jurisdiction and power as the Public Service Commission of the State of New York now has by virtue of Chap. 134 of the Laws of 1921 of the State of New York, or may hereafter have, with reference to the complainant and any rate or rates promulgated and put in effect by the complainant upon the entry of this decree." (Transcript of Record, *Newton* v. *The Brooklyn Union Gas Company,* No. 671, October Term 1921, p. 124a).

This was a recognition by the Court of the authority of the Public Service Commission in spite of the decree to regulate rates to be charged by the Company in accordance with the Public Service Commissions Law. The rates of $1.50 and $1.25 stated by appellant were each the result of a schedule filed with the Public Service Commis-

sion subsequent to the decree which the Public Service Commission had power to suspend (P. S. C. Law, § 66, subdivision 12) and which by its failure to suspend became the legal regulated rate.

Appellant then proceeds to argue that appellee, by reason of the density of consumption in its territory, should distribute gas more cheaply than is done in any other city of the United States with the exception of the borough of Manhattan, city of New York. There is no evidence before the Court of relative density of consumption in different cities nor is there any evidence concerning the rates, standards, territory, property or operating expenses of the companies mentioned by appellant in comparison with appellee (Brief, p. 12). Brown's Directory of Gas Companies, from which appellant cites, is not in evidence and if it were would show that the rate quoted for the Peoples Gas Light and Coke Company of Chicago is a secondary rate, the primary rate being 60 cents for the first 400 cubic feet, resulting in a rate of $1.50 per thousand cubic feet or 35 cents in excess of the rate now being charged by appellee. The Attorney General, moreover, calls the other companies which he now seeks to bring into this case without evidence "smaller and less favored companies". Again, if Brown's Directory of Gas Companies were in evidence it would show the Peoples Gas Light and Coke Company of Chicago selling 30,000,000,000 cubic feet in the year 1923 as compared with 15,000,000,000 cubic feet sold by appellee. The consequence is that not only does appellant cite statistics not before the Court but cites them incorrectly.

It is respectfully submitted that the decree should be affirmed, with costs.

CULLEN & DYKMAN,
Solicitors for appellee.

WILLIAM N. DYKMAN,
JACKSON A. DYKMAN,
of Counsel.

APPENDIX A TO BRIEF OF APPELLEE.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1921.

CHARLES D. NEWTON, as Attorney-General of the State of New York, HARRY E. LEWIS, as District Attorney of the County of Kings, State of New York, Appellants, *vs.* THE BROOKLYN UNION GAS COMPANY, Appellee.	No. 671. No. 40.

WASHINGTON, D. C., MARCH 9, 1922.

Before:

Mr. Chief Justice TAFT.
Mr. Justice HOLMES.
Mr. Justice MCKENNA.
Mr. Justice DAY.
Mr. Justice VAN DEVANTER.
Mr. Justice PITNEY.
Mr. Justice MCREYNOLDS.
Mr. Justice BRANDEIS.

APPEARANCES:

WILBER W. CHAMBERS, Solicitors for appellant Newton, &c.; WILBER W. CHAMBERS, CHARLES R. BUCHNER, of Counsel.

JOHN P. O'BRIEN, Corporation Counsel, Solicitor for appellant, HARRY E. LEWIS, District Attorney of the

County of Kings; JAMES A. DONNELLY, HARRY HERTZOFF, of Counsel.

CULLEN & DYKMAN, Solicitors for appellee, WILLIAM N. DYKMAN, JACKSON A. DYKMAN, EDWARD J. CRUMMEY, of Counsel.

MR. DONNELLY: We will take the main appeal No. 671. May it please the Court, I appear on behalf of the appellant Lewis, and it is unnecessary, perhaps, to state that this is a gas case in which the same questions practically are involved as were before this Court in the Consolidated Gas case, which was decided on Monday of this week. Our briefs were all filed, as the Court will probably appreciate, before the decision in the Consolidated case came down, but I may say to the Court that since that decision was published my associates and I have devoted the intervening time to a very careful study of the Court's opinion, and it is because we believe, if the Court pleases, that there is at least one feature about this case which is sharply distinctive from the Consolidated Gas case, that we deem it our duty to the interests and the clients that we represent, to present that distinguishing feature for the consideration of this Court.

In this case as in the Consolidated case there was accumulated a contingency reserve, a reserve here which approximates the sum of $13,000,000. I may say in passing that I do not believe it will be necessary for the Court to refer to the record in the case at all, because the facts on both sides, as I look at the briefs, having read them and given very careful study and attention to them, are undisputed, and the only question that remains, so far as the contingency reserve is concerned, is as to whether or not the Court agrees with the point made by the appellants in regard to the disposition which shall be made of it.

Now, in this case, as in the Consolidated case, the contingency reserve was accumulated out of earnings of the Gas Company, to take care of operating losses, as evidenced by the manner in which the appellee Gas Company itself treated the reserve.

The Master himself, in the Brooklyn Union case, deducted the sum of $150,000 from the contingency reserve for the purpose of taking care of the expense caused to the Gas Company by a strike at its manufacturing plant in the summer of 1919. When the case came before the District Judge, Honorable Julius M. Mayer, on the exceptions filed to the Master's report he said, speaking of the contingency fund—and I ask the Court's permission to read it, because it is brief, from page 116-A of Volume I of the record in this case:

"The contingency fund. There is much argued upon this point. If there were an actual cash contingency fund on hand, it might well be contended that it ought now to be utilized to carry plaintiff over a confiscatory period. This so-called fund, however, does not exist as cash, it has gone into the property in one form or another. That dividends have been paid in the past, does not produce a cash fund in the present. As was said by the statutory court, 'The question for our present consideration is not whether the plaintiff enjoyed remunerative returns in prior years, which were perfectly legal, but whether at the present time it is receiving and is likely to receive in the future a fair return upon its invested capital. We think no one would contend for the converse proposition; viz., that if in prior years the plaintiff had received very inadequate returns it ought to have for that reason, in the present and future, more than a fair return upon its capital invested.' "

Now, in support of the statement that I made at the beginning of my argument, that this contingency reserve

was accumulated by the Gas Company for the purpose of taking care of operating losses—and then I used the language, "as evidenced by the appellee's own conduct" —I desire to call to the Court's attention what the appellants here regard as a very significant circumstance: That in August, 1919, the appellee Gas Company made application to the Public Service Commission of the State of New York for permission to issue bonds against the sum of $2,000,000 which had been drawn from this contingency reserve and put into capital expenditures, put into plant betterments or improvements to their manufacturing plants, and that permission was granted, and out of that $2,000,000, the proceeds of those bonds which were issued, the appellee Gas Company used, according to an affidavit, and I am quoting from an affidavit now which we have cited on page 3 of our reply brief—according to an affidavit made by the appellee in the statutory court when the motion for a preliminary injunction in this present gas case was made in that court, a part of $2,000,000 for which the Gas Company received permission from the Public Service Commission to issue bonds, was used to pay what the appellee described as operating losses in the year 1919, and there was also used $750,000 to pay interest on their $15,000,000 of bonds at the rate of five per cent., and the balance, $1,080,000 was used to pay dividends during 1919. Consequently we say that so far as anything can be gleaned from the language of this Court's opinion in the Consolidated case, I have been unable to find anything there which runs counter to the argument which is now addressed to the Court, that the appellee having itself placed a practical construction upon the use to which that contingency reserve might be devoted, in other words having used it for the very purpose for which the appellants contend it should be used, that the Court might very well take that into consideration in passing upon the appeal in this case.

THE CHIEF JUSTICE: How would you vary the order of the Court, in what respect—the one made in the main case?

MR. DONNELLY: If the Court should determine that the contingency reserve should be used as the appellee itself has used it, for the purpose of taking care of operating losses, then if the reserve was devoted to that purpose, it would, to use the language of the District Judge, the Honorable Julius M. Mayer, carry the appellee over the confiscatory period. As a matter of fact, he says in his opinion, affirming the decree of the Master —and I think I quote his language almost literally:

"If the contingency fund were in cash, were now available as cash, it might very well be contended that it could be used by the plaintiff to tide it over the confiscatory period."

MR. JUSTICE BRANDEIS: Would you agree with the statement of the District Judge that "obviously a past deficit would not be a justification for charging more than a reasonable rate to day," as compared with the statement that you read to us?

MR. DONNELLY: I would not, respectfully speaking, of course, for this reason: That the contingency reserve which was contributed by the consumers, having been set aside by the Gas Company for the purpose of taking care of these losses——

MR. JUSTICE BRANDEIS (interrupting): Is that anything more than prudent financial management, as distinguished from reckless financial management—not paying out every cent you earn? There are certain definite contingencies to be met, and among others is the contingency as to whether the Court will or will not grant redress and grant it quickly enough to be of service to the public. Now, prudent financial managers would want to insure against that contingency as much as they insure against fire or anything else. Why should they not have a reserve for that purpose?

MR. DONNELLY: I can only sumbit that to the Court. I do not think I can add anything to what I have already said. I have no desire to evade the Court's question. I hope the Court believes that.

MR. JUSTICE PITNEY: It is private property, isn't it, that has been reserved back out of what could have been paid out to the stockholders if it saw fit to do so?

MR. DONNELLY: Yes, sir.

MR. JUSTICE PITNEY: Held back out of what it has received as compensation, and it is private property on which it is entitled to compensation if it is used in the public service?

MR. DONNELLY: Yes, sir.

MR. JUSTICE PITNEY: Still you say it ought to be exhausted in hard times or times of high prices or anything else that makes the business no longer profitable, before it can seek relief?

MR. DONNELLY: I think it may be fairly said, sir, that the expression "private property" does not quite describe it. It is something more than private property. It must be regarded as a trust fund for the consumers. It is money taken from the consumers.

MR. JUSTICE PITNEY: Beyond what they were entitled to take?

MR. DONNELLY: Oh, no, it was not taken in the sense that the company did not have the right to take it.

MR. JUSTICE PITNEY: Then it was the result of prudent accumulation of property that the company had a right to take out of its earnings after having served the public at a reasonable rate; that is, it was the result of what it laid aside?

MR. DONNELLY: Well, sir, I thought there was a somewhat different aspect here from what the Court had before it in the Consolidated case, by reason of the way in which the appellee itself treated that reserve. And then again, the language that the District Court used,

that if the fund were in cash and now available in cash, it might be well contended that it could be used to carry the company over the confiscatory period.

THE CHIEF JUSTICE: As I understand it, your contention is that that fund should be considered by the Court now in determining whether the rate of 80 cents was confiscatory, or whatever that rate was?

MR. DONNELLY: Yes, sir. In other words, I do not think the Court would be doing any injustice to treat this fund as the appellee itself treated it.

MR. JUSTICE PITNEY: As I understand you, the appellee has spent this money to make betterments to the property—made capital of it?

MR. DONNELLY: Yes, sir.

MR. JUSTICE PITNEY: And then it needed money and got permission from the Public Service Commission to issue bonds against it?

MR. DONNELLY: Yes, sir.

MR. JUSTICE PITNEY: Part of which they thought it prudent and perhaps necessary for the company to spend?

MR. DONNELLY: Yes.

MR. JUSTICE PITNEY: And because that should be done on the application of the company, you say it ought to be done without the company's consent.

MR. DONNELLY: They used part of it to pay losses, part of it to pay dividends, all of which it had a perfect right to do.

MR. JUSTICE BRANDEIS: Over how long a period was this reserve accumulated?

MR. DONNELLY: In 1906, as I recall it, the company began an account entitled "Depreciation and Contingencies," which was continued down to the 31st of December, 1917, when the account was changed to Contingencies, the words "depreciation and" being dropped from the account, and there being transferred to the new

account, entitled "Contingencies," the balance that was in the old account.

MR. JUSTICE BRANDEIS: Practically for ten years preceding?

MR. DONNELLY: Oh, yes, and from January 1st, 1918, the date when the new account began to be called "Contingencies," starting in on that day with approximately $11,000,000, it grew by January 1st, 1920, to approximately $13,000,000, by adding or crediting to it six and one-half cents out of every eighty cents collected by the Gas Company from the consumers.

And, by the way, that reminds me, if the Court pleases, that when Mr. Payne, the auditor of the Gas Company, the gentleman under whose supervision the books have been kept since the company's organization in 1895, was on the stand on direct-examination, he was asked if any part of that fund had been used for any purpose and he said no, it had not.

MR. JUSTICE PITNEY: Did the company credit the fund with any interest?

MR. DONNELLY: I do not think so, sir. All they credited to the fund was the six and one-half cents.

MR. JUSTICE MCREYNOLDS: That is nothing more than a bookkeeping surplus, is it?

MR. DONNELLY: I would not say so.

MR. JUSTICE MCREYNOLDS: Suppose they had called it "surplus" wouldn't it have been the same thing?

MR. DONNELLY: No, sir, I do not think it would.

MR. JUSTICE MCREYNOLDS: Why?

MR. DONNELLY: Here we have a very definite notion of what it was.

MR. JUSTICE MCREYNOLDS: It seems to me it is a question of how they carried this account and what it is called. And if they called it surplus, they would have just as much as they have got, wouldn't they?

MR. DONNELLY: Yes.

MR. JUSTICE MCREYNOLDS: Then would you claim they must exhaust the entire surplus or must suffer a $13,000,000 loss before they can have relief from this statute? Is that your idea?

MR. DONNELLY: No, sir, because the period over which this would be spread would not be so long as to eat into $13,000,000. The only year in which the Master found a deficit in operations here was the year 1920, and that was for the first ten months of 1920, and so far as the period here is concerned, I think a large part of this discussion may be fairly characterized as academic in view of the power vested in the Public Service Commission since March 31, 1921, to give the Gas Company adequate relief. In other words, if the deficit started in 1920, and we will assume for the purpose of this discussion that it kept on right up to the time of which I am speaking the relief from this condition that was existant on the 31st of March, 1921, was such that there would not be very much of a loss there to make up.

MR. JUSTICE PITNEY: Aren't you pretty nearly saying that in order to determine whether a rate is compensatory that instead of basing it on a fair return on the property used in the public service, you are basing it on what the company can afford to lose before it can squeal for relief?

MR. DONNELLY: That may be a broad construction to be placed upon my argument, sir, but I may say in answer to that that the conditions which existed in 1919 when the returns began to go a little bit below, as found by the Master, were intensified for the appellee here by the fact that it had a strike at its plants, and they had the abnormal conditions engendered by the Great War, they had those conditions intensified by the strike they had.

MR. JUSTICE BRANDEIS: Yes, but the Court below did not consider the extra cost of the strike, as I understood

you, as a charge to be taken into consideration in determining whether there was a fair return. I mean in charging up strike expense against the contingency fund instead of as in the current account, it indicated the purpose to consider that as an abnormal thing and therefore not to be taken into consideration in determining whether a fair return had been paid.